UNSETTLED: A GLOBAL STUDY OF SETTLEMENTS IN OCCUPIED TERRITORIES

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ABSTRACT

This article provides the first comprehensive examination of international practice bearing on Article 49(6) of the Fourth Geneva Convention. This provision is the basis for legal criticism of Israeli settlement policy. This article closely examines the international community's treatment of settlers in all situations governed by the Geneva Conventions, to test the broad view of 49(6) advanced in the Israeli context against state practice regarding the rest of the world. It finds that the growth of settler populations is a ubiquitous feature of long-term occupations of contiguous territory, but one that is not characterized as violating the Geneva Convention.

1. INTRODUCTION

This article presents the first global study of possible violations of Article 49(6) of the Fourth Geneva Convention of 1949, and the international reactions and state practice related to such violations. Article 49(6), which prohibits what is colloquially known as settlements in occupied territory, is ubiquitously invoked in relation to the Israeli presence in the West Bank and Golan Heights. Yet, the scope and meaning of the underlying Geneva Convention rule remains a mystery. No national or international criminal tribunal has ever applied the rule.

As this article will show, a wide range of erstwhile and ongoing occupations involve large-scale colorable violations of Article 49(6). An examination of settlement activity—and international reactions to it—across all available geopolitical contexts yields a more scientific and accurate understanding of the nature of the prohibition than an examination of it in merely one (perhaps uniquely politicized) context. Numerous countries that have engaged and continue to engage in settlement policies that would constitute clear violations of Article 49(6), at least under the conventional wisdom concerning the meaning

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of the prohibition as described in writings about the Israeli context. These non-Israeli settlement efforts have often been on a large scale, and have involved far-reaching demographic and economic consequences for the occupied population.

Legal discussions of Article 49(6), however, are almost invariably centered on the Israeli case,[1] and do not examine its potential applicability elsewhere.[2] For example, the International Committee of the Red Cross's (ICRC) (2016, VI–VII) influential *Study on Customary International Humanitarian Law* lists 107 instances of national and UN practice applying or interpreting the prohibition, and all but two relate to Israel.[3]

As a result, our understanding of Article 49(6) remains thin and lacking; the interpretation of it comes from a single case, rather than from systematic evidence of state practice. One can draw an infinite number of lines through a point. Studying all the available data however—i.e., all settlement practices elsewhere—can provide greater meaning and definition to the rule, or at least address some of the many questions about its meaning.

This article examines every occupation since the adoption of the Geneva Conventions that involve the movement of civilian population into belligerently occupied territory. Eight such situations were identified. No previous work has examined them together. Indeed, for several of the situations, there has been no prior academic work on the relevant settlement policy. Thus, one of the additional contributions of this article is the first scholarly examination of Russian and Armenian occupation practices in light of international law.

1 See, e.g., Benvenisti (2012, p. 310) (mentioning Indonesia's and Turkey's settlement efforts in a few passing sentences, but does not discuss Article 49(6) in light of these practices). Other related scholarship, *see* Ronen (2008, p. 154), casts the inquiry in different terms—not of settlers in occupied territory under the Geneva Conventions, but of "illegal territorial regimes." That category only partly overlaps with belligerent occupation, which is not in itself unlawful. Similar, Haklai & Loizides (2015, pp. 13–16) provide excellent accounts of settlers in contested territories in a variety of conflicts, but do not limit their case studies to any particular "legal categories," which they note have been "largely ineffectual" as responding to the underlying problems.

2 There are forty-seven matches in the Westlaw "secondary source" database for < ("49(6)" "its own civilian population" "illegal settlement") /20 Israel>—that is, a search for one of several terms relating to the Geneva prohibition within proximity of a discussion of Israel. There is only one match for the same search relating to all the other situations discussed in this article combined— < ("49(6)" "its own civilian population" "illegal settlement") /20 (Lebanon Vietnam Russia Morocco Turkey Indonesia Armenia)>, Search conducted August 23, 2016.

3 The ICRC does not include any state practice dealing with any of the settlement situations discussed in this article. *See* ICRC Customary Law Database (2016). The two non-Israel-related statements, by Kuwait and the USA, are condemnations of Iraqi settlement activity in Kuwait during the 1990 invasion. UN Security Council Res. 677 (1990) "condemned attempts by Iraq to alter the demographic composition of the population of Kuwait" but did not mention Article 49(6) or use the terms settlements or settlers.

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The state practice of the occupying powers in these other situations, as well as the international reaction to them, forms a remarkably consistent pattern. This pattern is contrary to, or at least in substantial tension with, hypotheses about Article 49(6) generated solely based on the Arab–Israeli situation. Thus, since the conventional understanding of Article 49(6) has been based almost entirely on the Israeli example,[4] this article shows that it requires a fundamental reexamination.

While the study of state practice cannot precisely define the scope of Article 49(6) liability, it does show that standard discussions of the norm define the prohibited conduct far too broadly. In particular, there is no support in state practice for the notion that mere facilitation or accommodation of settlement activity violates the norm, or that there is any duty to prevent, obstruct, or discourage settlement activity.

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Several questions about Article 49(6) and related rules can be illuminated by the current study. Article 49(6) of the Fourth Geneva Convention provides that the "Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies (Fourth Geneva Convention Art. 49, para. 6)." Adopted in 1949, Article 49(6) has no parallel in prior humanitarian law such as the Hague Convention of 1907, and is not seen as reflecting customary international law, at least at the time (Henckaerts 1993, p. 484). No one has ever been prosecuted for this war crime, and its interpretation has been confined to academic and political statements—entirely within the particular context of Israel. The one exception is a few sentences of dictum in an advisory opinion by the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[5]

As a result, there are many unanswered questions about the scope and application of the prohibition. To the extent that answers have been suggested to these questions, they have been based on theory and casuistry, rather than on practice and precedent. The evidence presented here sheds light on at least three questions about Article 49(6): what types of governmental conduct violate the

4 *See* Benvenisti (2012, pp. 240–241) (observing that "the scope of the prohibition ... has been strengthened and refined" entirely "in light of this [Israeli] example").

5 2004 ICJ Rep. 136 (hereinafter Wall Opinion). While the legality of Israeli settlements was not part of the question submitted by the General Assembly, it nonetheless, mentioned in a dictum that all Israel's settlements "have been established" in violation of the Geneva Convention (*id.*, para 120). However, the Court's discussion of the issue consisted of a few conclusory sentences that offered nothing to justify its interpretation.

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prohibition; who is considered a settler; and what constitutes the proper remedy for the violation?

The first question involves the nature of government conduct required to violate the prohibition. For example, some argue that "transfer" of "part of a population" would only apply to large-scale governmental movements of people into an occupied territory. It would not, in this view, ban an occupying power for allowing its nationals to move into and inhabit such territories; to engage in private real estate transactions; and otherwise migrate. The International Court of Justice's (ICJ) *Wall Opinion* suggested a much broader reading of the provision, to prohibit "measures taken by an occupying power to organize or encourage" the otherwise autonomous movement of its civilian population (*Wall Opinion* 2004, pp. 183–84). However, the court did not cite any state practice or any other authority to justify this expansive gloss on Article 49(6). Nor did it provide guidance about the types of state action that would fall into these two categories.[6]

A related question arises concerning the wording of the Article 49(6) prohibition incorporated into the definition of crimes in the Rome Statute of the International Criminal Court. Unlike all other war crimes provisions in the statute, whose language is borrowed verbatim from existing international humanitarian law (IHL) instruments, the settlement provision was broadened to include "directly *or indirectly*" transferring population.[7] Some interpretations view this as including mere "facilitation" of autonomous population movements (i.e., paving roads and so forth), and others have gone so far as to suggest that it transforms the prohibition into an affirmative duty to prevent people from moving into the territory.[8] On the other hand, the ICJ's Elements of Crimes provide that the provision must be understood in light of existing IHL practice.[9] As a result, this article's survey of global state-sanctioned

6 Others have gone further and suggested that mere "passive acquiescence" in population movement into occupied territories violates Article 49(6). *See* Report of the United Nations and Peoples Organization Conference on Population Transfer 8 (1992).

7 *See* Rome Statute, Art. 8(2)(b)(viii). The provision was inserted in the drafting conference at the request of Arab states, specifically to cover Israel's conduct. However, the legal impact of this is unclear because of the circumstances of the drafting, the novelty of the provision and the lack of subsequent applications. *See* Von Hebel & Robinson (1999, pp. 112–13).

8 *See* Schabas (2010, p. 235) (arguing that the provision applies to cases where "the occupying power does not actually organize the transfer of population, but does not take effective measures to prevent this").

9 The ICC's Elements of Crimes provide that the language "needs to be interpreted in accordance with the relevant provisions of international humanitarian law," a circular reference back to the Geneva Conventions. This provision in the Elements was sought by the American delegation to "remove novel arguments about indirect tax incentives to transfer a population." *See* Scheffer (2013, pp. 235–236).

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settlement practices is crucial to understanding not just the scope of Article 49(6), but also its potentially broader Rome Statute counterpart.

Other questions involving the scope of the prohibition relate to who is counted as a settler. For example, are children born to transferred persons themselves "settlers" who constitute a further violation of the prohibition?[10] Similarly, Article 49(6) prohibits the occupying power from transferring "its" civilian population. It is not clear if this also prohibits settlers from third countries. In the context of the Convention's text, it would seem to refer to prior residents of the territory of the occupying power. On the other hand, the UN Security Council has stated in one context that allowing immigrants from third countries to settle in occupied territory constitutes an Article 49(6) violation.[11]

A separate question is the remedy for Article 49(6) violations. A maxim of international law states that the remedy for a breach requires the violation to be halted immediately and reparations made for any damage caused (e.g., Naiman 2009; Woods 2010). A more controversial question is whether further action is required. The ICJ has stated that under customary law:

> [R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear . . . should serve to determine the amount of compensation due for an act contrary to international law (Wall Opinion 2004, 198).

In accordance with this statement, some officials and scholars demand Israel dismantle its outposts, remove all settlers from the occupied territory, and make payments to Palestinians whose property was used or destroyed.[12] However, aside from practical difficulties in expelling large populations, figuring out what

10 See, e.g., UN G.A. Res. 66/225 of 29 March, 2012 (calling on Israel to "freeze settlement activity, including so-called 'natural growth'").

11 UNSC U.N. S.C. Res. 465, Art. 5 (1980).

12 For example, Rettman (2009); Klinov (2007, p. 1) ("The payment of financial reparations to Palestinian refugees has been widely recognised as an essential component of any resolution of the Israeli-Palestinian conflict."); Quigley (1998, p. 25) (although the occupying government must treat its civilian settlers humanely, it is nonetheless obligated to facilitate their evacuation). During Israel's withdrawal from the Gaza Strip in 2005, the Israeli Defense Force forced Israeli citizens from the area and demolished over 2,000 homes and government structures (Kalisar 2007, p. 219). Israel also removed all of its several thousand settlers when it withdrew from Sinai in 1982.

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the situation would look like in the absence of a decades-long settlement is not simple.[13]

This article identifies and examines all the prolonged occupations that have involved the movement of civilian population into an occupied territory since the adoption of the Geneva Conventions.[14] A word should be said about the inclusion criteria used to identify the situations studied here. Every belligerent occupation since 1949 lasting more than one year was examined to see if there was a civilian population movement into the occupied territory. Those that involved such movement are examined in detail below.

Because of the vast volume of work written on Israeli settlements from a political, historical (*see, e.g.*, Gorenberg 2007; Zertal & Eldar 2007), and legal perspective (see, e.g., Ronen 2008; Benvenisti 2012), this article does not replicate that work, but rather uses the legal theories about Article 49(6) developed in the Israeli context to generate hypotheses about the prohibition, to test against the other situations.

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The occupations examined in this study are ones that appear to satisfy the international legal definition of occupation, which has most extensively been elaborated in the context of Israel.[15] One of the axioms of military occupation is that its existence "is a question of fact."[16] If the definition of occupation is satisfied, then an occupation exists, regardless of the surrounding political circumstances. This means that it does not matter that the occupier rejects (as it typically does)[17] or accepts the classification. Nor does it matter if some organ of the international community labels it as such, though this is certainly probative. Thus, Yutaka Arai, the author of one of the leading treatises on belligerent occupation, notes the central role Israel plays in discussions of

13 Some level of voluntary migration from one state into a neighbor typically occurs even absent prohibited population transfers. To truly recreate the demographic composition that would have existed in an occupied territory absent the Article 49(6) violation, perhaps such migration should be accounted for and some percentage of settlers allowed to remain. See, e.g., Hania Zlotnik (1998, p. 434) (canvassing statistics on international migration from 1965 to 1996, and observing that "all countries . . . have been the destination of some migration during this century").

14 Some prolonged occupations have not resulted in discernible settlement activity—such as the U.S. occupations of Afghanistan. However, there have apparently been no instances of prolonged occupation of *adjacent* habitable territory that have not seen settlement activity.

15 The inclusion of the situations does not mean that they do in fact violate Article 49(6)—that is impossible to say due to the lack of authoritative application of the provision. However, they all fit the profile of the kind of activity that is generally said to violate Article 49(6).

16 US Army Law of War Manual 11.2.2 (2015).

17 Almost all occupiers in the post-WWII era have not accepted the characterized themselves as such.

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occupation, but notes that East Timor, Cambodia, Northern Cyprus, and other situations as examples of other "less discussed" occupations.[18]

An occupation arises whenever one country forcibly takes control of territory beyond its prior *de facto* frontiers. As the ICRC's Commentary of the Geneva Convention puts it:

> Occupation exists as soon as a territory is under the effective control of a State that is not the recognized sovereign of the territory. It does not matter who the territory was taken from. The occupied population may not be denied the protection afforded to it because of disputes between belligerents regarding sovereignty over the territory concerned.[19]

The definition is fairly "encompassing" and includes situations where the occupying power claims sovereignty, but did not have clear title before taking control (Arai 2009; Benvenisti 2012). In this view, a sovereign *claim* by the occupier does not vitiate an occupation. Of course, a state cannot occupy its own territory. If during a conflict a state retakes territory it had previously administered as sovereign territory but that had been occupied during the conflict, that would not be an occupation.[20] But none of the cases studied in this article fit that pattern.

To be sure, because underlying sovereignty is not irrelevant to the existence of an occupation, states typically claim such sovereignty, or the invitation of the local population, to avoid the legal status of "occupation." However, such "'official' proclamation ... is of little import to the juridical evaluations ... states cannot escaped from legal responsibility under ILH behind the camouflage of annexation, incorporation or whatever denomination they may ascribe to their control over a territory outside their boundaries."[21] As Benvenisti puts it in the case of Israel and Jerusalem, "even if the occupation asserts a

18 N.3. Moreover, the ICRC has described all the situations discussed herein as belligerent occupations. See ICRC (2012).

19 International Committee of the Red Cross (2016).

20 U.S. Army Law of War Manual, p. 748, s.11.2.2.3 (["T]he law of belligerent occupation would not apply to the liberation of friendly territory that was previously occupied by the enemy.")

21 Benvenisti (2012, pp. 10–11). It should be noted that in this regard Israel does not, as is commonly thought, "accept" its status of occupier. As a legal "gap filler" the government has chosen to apply certain "humanitarian" provisions of the Geneva Conventions as matter of grace. However, Israel does not regard the conventions as applying *de jure*. *See* Benvensiti (2012, p. 112) (noting the "official Israeli refusal to recognize the applicability of the law of occupation"). This explains the government's view that Article 49(6) does not apply, and its annexation of Jerusalem and the Golan Heights. Israeli settlements in the Golan and Eastern Jerusalem, which are under complete civilian rule, are criticized in the exact same terms as those in the West Bank, suggesting it is not military government that distinguishes the treatment of Israel.

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reasonable – albeit contested – claim for sovereignty, it is not allowed to use its effective control to have its claim prevail."

In all of the situations examined here, the international community did not recognize the occupant's claim over the territory, and typically categorically rejected it.[22] In any case, the understanding of occupation applied in the Israeli context is that disputes about sovereignty do not remove the applicability of the Conventions. As the influential Ethiopia–Eritrea Claims Commission ruled, it is not the case that "only territory the title to which is clear and uncontested can be occupied" (Eritreat-Ethiopia Claims Commission 2004, p. 1282). If this were the case, occupation would be a dead letter, whereas in fact it is not uncommon (Dinstein 2009, p. 11).

For example, at the time Morocco occupied Western Sahara, the latter was a kind of orphaned colony, with the former sovereign having decamped but no new sovereignty having been established. (This somewhat fits the facts of Indonesia/East Timor as well.) One might argue that Morocco's takeover was not an occupation because it did not involve the sovereign territory of a foreign *state*.[23] However, the consensus view in international law is that the hostile occupation of any territory *beyond* a nation's recognized borders creates an occupation (Arai 2009). In short, the occupation can apply to non-sovereign territory—indeed, this consensus was arrived at in the context of Israel's 1967 control of the West Bank and Gaza, which at the time were also orphaned territories under no clear sovereignty (ICJ Wall Opinion 2004).

Because Article 49(6)'s prohibition depends on the existence of an international armed conflict governed by the 1949 Geneva Conventions, several situations involving settlers in areas occupied before the Conventions went into force are omitted.[24] The retrospective applicability of the 1949 Conventions to occupations already in existence at the time the treaty went into effect is an obscure and disputed question.[25] Thus, the Soviet occupation of the three Baltic states (1940–1991); the U.S. co-occupation of West Berlin (1945–1990); the

22 Though legally irrelevant—occupation is a question of fact—the international community's general rejection of Israel's view of the West Bank's sovereignty is seen as cementing the applicability of the Geneva Conventions (Meron 2017, pp. 1–19).

23 The European Commission weakly suggested this possibility regarding Western Sahara in an attempt to distinguish its status from the West Bank—a view ultimately rejected by the European Court of Justice. See Kontorovich (2015, 610–612).

24 The requirement of an international armed conflict simply excludes civil wars or "non-international armed conflicts." Thus, the Syrian policy of settling Shiites from Iraq and elsewhere in ethnically cleansed Sunni areas is not governed by Article 49(6) because the conflict is treated as primarily a civil war.

25 A straightforward reading of the Convention suggests it is purely prospective. See Article 153. On the other hand, at the drafting convention, the USA expressed some concern that it would apply to the

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Chinese takeover of the Second East Turkestan Republic (1949) and Tibet (1950), the Indo-Pakistani division of the Kashmir (1947) (Times of India 2015); and the Egyptian and Jordanian occupation of parts of the former territory of Mandatory Palestine (1949–1967) are excluded.[26] While all but the last of these have involved significant, and typically massive, government-organized "settlement" enterprises, they are excluded for the sake of definitional precision and to ensure an examination of only legally comparable situations.[27]

As this article introduces each situation in the following sections, the relevant facts supporting the characterization of the situation as a belligerent occupation are outlined. These facts include the movement of military forces across a previously established international frontier; the takeover of government functions by those forces; and the existence of an international armed conflict. It is worth noting that in almost all these cases (except East Timor and Lebanon) the existence of an occupation has been declared in United Nations resolutions and other clear expressions of international opinion. Since occupation is a question of fact, such resolutions are not conclusive, but provide a strong basis for treating these cases as comparable.

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A few words should be said about the evidentiary significance of state practice examined in this article. State practice—the positive conduct and legal positions of states—is one of major modes of determining international law. International law rules are those that best fit observed state practice. To be sure, the question here involves a particular treaty provision.[28] While the extent to which subsequent practice can modify the express meaning of a treaty is highly controversial (see e.g., Nolte 2012, 2013) consistent practice is a widely accepted method of interpreting treaty provisions.[29] Given that Article 49(6) is—by the terms of its

then-current occupations of Germany and Japan (Pictet 1958, p. 62). The question does not seem to have been resolved. For a thorough discussion of the competing views, *see generally* Mälksoo (2003).

26 Similarly, Indonesia's takeover of West New Guinea in 1963 did not involve an international armed conflict, as the territory was transferred to it by the United Nations. While Indonesia may have breached its international commitments by not complying with the self-determination guarantees it had provided prior to the hand-over, this does not trigger the Geneva Conventions.

27 It bears noting that the inclusion of these cases would not change the conclusions of this article. Almost all of these situations saw or continue to see an often massive influx of settlers without any international legal condemnation.

28 Vienna Convention on the Law of Treaties, Art. 31(3)(b), 1155 U.N.T.S. 331 (codifying that a legitimate method of treaty interpretation is to consider "subsequent practice" under the treaty).

29 See Murphy (2013) (noting the widespread acceptance of the "use of subsequent practice of treaty parties for the interpretation of an ambiguous treaty provision").

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own official commentary—not based on past practice and is awkwardly drafted,[30] subsequent practice is crucial to defining its meaning.

The idea that such practice can help define the scope of Geneva Convention rules is not controversial—it is the entire theoretical justification for the ICRC's massive compendium of state practice. Moreover, most accounts of Article 49(6) have not been based on a literal reading of its terms, but rather on an examination of how it has been applied in one particular situation. Thus, its application in eight cases should have considerably more interpretive weight.

An examination of these conflicts suggests that there is no basis to assume (as, e.g., the ICJ has) that a state's mere "encouragement" of civilian settlers is enough to bring the state within the purview of Article 49(6). Moreover, neither international organizations nor the new governments of previously occupied territories have ever embraced the forcible removal of illegally transferred civilian settlers. On the contrary, history suggests that such settlers often get a voice in deciding the territory's fate and, in most circumstances, have a right to remain in the area after occupation has ended.

Sections 2–8 examine in detail every prolonged belligerent occupation that has involved a movement of settlers into the occupied territory since the adoption of the Geneva Conventions. Notably, the situations described in Sections 5, 7, and 8 have not previously been studied as possible violations of Article 49(6). Each of these sections describes the geopolitical context of the situation; explains how it qualifies as a belligerent occupation; describes in detail the possible violations of Article 49(6) by the occupying power; and details any international reaction, including the treatment of settlers in peace plans or post-conflict transitions. The conclusion summarizes what the state practice shows and addresses methodological issues and objections.

2. EAST TIMOR (TIMOR-LESTE)

2.1 History of the Conflict

The island of Timor is located nearly halfway between the northwestern coast of Australia and the southeastern end of Indonesia's Sunda archipelago (Krieger 1997, p. xix). East Timor comprises the eastern half of the island and today has a population of just over 1,000,000 people (World Bank 2010). Until the

30 See Pictet (1958, p. 278) (noting that the provision was "adopted after some hesitation" and that its wording is not fully "logical").

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mid-1970s, East Timor was a Portuguese colony,[31] but after the Portuguese government's overthrow in 1974, Portugal recognized the right of self-determination for territories under Portuguese control.[32] The Portuguese passed legislation setting the stage for a transfer of power to a democratically elected independent government in this territory in October 1978.[33]

As Portugal began preparing to leave, Timorese groups initiated fighting for immediate independence. After several months, the Revolutionary Front for an Independent East Timor (FRETILIN) militia controlled most of the territory and on November 28, 1975, FRETILIN declared East Timor an independent nation.[34] Indonesia, however, wished to have all the territory of its archipelago within a united Indonesian state. On December 7, 1975, Jakarta launched naval, air and military forces against East Timor (most of the combat took place between FRETILIN forces and Indonesia, as the Portuguese forces quickly retreated).[35] In July 1976, the Indonesian parliament annexed East Timor and declared it the country's 27th province.[36]

East Timor remained under Indonesian control for the next quarter-century. It was not until 1999, facing pressure from the UN and convinced that a referendum would in fact result in a pro-integration decision, that Indonesia permitted the East Timorese to hold a referendum—a choice that ultimately resulted in an independent East Timorese nation.

2.2 Reaction of the International Community

From the moment of invasion until the popular referendum in 1999, Portugal maintained that Indonesia's occupation and annexation of East Timor was illegal, violating both the prohibition against the use of force in Article II of the UN Charter and the right of former colonies to self-determination adopted

31 G.A. Resolution 1542 (XV), U.N. Doc. A/RES/1542(XV) (December 15, 1960); G.A. Resolution 3294 (XXIX), U.N. Doc. A/RES/3294(XXIX) (December 13, 1974). *See generally*, Drew (2001, p. 651); Krieger (1997); United Nations, Dept of Public Information(2000); CAVR (2005).

32 Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Working Paper on Timor Prepared by the Secretariat, ¶ 4, U.N. Doc. A/AC.109/SC.6/Add.1, reprinted in Krieger (1997, p. 18); *see also* Portuguese Constitutional Law, Art. 1, 2 7/74 (July 27, 1974), *reprinted in* Krieger (1997, p. 34); Portuguese Constitutional Law 7/75 (July 17, 1974) Art. 1, *reprinted in* Krieger (1997, pp. 34–36).

33 Portuguese Constitutional Law 7/75, Arts 2–5(1974).

34 *Id.*; *see also* Letter from the Charge d'affaires of the Permanent Mission of Portugal to the United Nations Secretary-General (November 28, 1975), *reprinted in* Krieger (1997, p. 35).

35 Letter from the Permanent Representative of Portugal to the President of the United Nations Security Council (December 7, 1975), *reprinted in* Krieger (1997, p. 42).

36 Legalization of the Integration of East Timor into the Unitary State of the Republic of Indonesia and the Formation of the Province of East Timor, Law 7/76 (1976).

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in General Assembly Resolution 2625 (XXV).[37] The international community strongly deplored Indonesia's use of force against Portuguese East Timor[38] and rejected its purported annexation.[39]

For eight years, the General Assembly adopted annual resolutions condemning the situation in East Timor, although each year the number of affirmative votes declined.[40] Following its eighth resolution, in 1982, the General Assembly took no action regarding East Timor until 1999. During this interim period the Secretary-General initiated consultations with all parties and issued annual progress reports to the General Assembly.[41] Portugal, meanwhile, continued to support the East Timorese and to denounce Indonesia's actions.[42]

In 1998, the conflict began to ease. Longtime Indonesian nationalist President H.E. Suharto resigned that year, allowing (then new) Secretary-General Kofi Annan to quietly initiate peace talks between Portugal and Indonesia.[43] Confident that after twenty-five years of occupation, Indonesia's influence on East Timor would result in a pro-integration decision, Suharto's successor, President B.J. Habibie, announced his intention to hold a popular referendum. Habibie proposed an autonomy plan that would continue to give Indonesia sovereignty over East Timor, but would cede control over most

37 For example, Statement of the Permanent Representative of Portugal to the U.N. to the President of the U.N. Security Council, U.N. Doc. S/PV.1864 ¶¶ 48, 59 (December 15, 1975), *reprinted in* Krieger (1997, pp. 54, 58, 60), (noting the "Indonesian armed aggression against Portuguese Timor constitutes a blatant, undeniable violation of the Charter of the United Nations"); Report from the Permanent Mission of Portugal to the United Nations Secretary General ¶ 1, U.N. Doc. A/52/152 (May 19, 1997) (same).

38 G.A. Resolution 3485(XXX), U.N. Doc. A/RES/3485(XXX), ¶ 4 (December 12, 1975) (14 members for: 1 against) (calling upon Indonesia to "[D]esist from further violation of the territorial integrity of Portuguese Timor and to withdraw without delay its armed forced from the territory in order to enable the people of the Territory freely to exercise their right to self-determination and independence."). *Id.*, ¶ 5.

39 G.A. Resolution 31/53, U.N. Doc. A/RES/31/53, ¶ 5 (Dec. 1, 1976).

40 *See* G.A. Resolution 3485(XXX), (1975) (14 members for: 1 against); G.A. Resolution 31/53, *supra* note 39 (15 for: 2 against); G.A. Resolution 32/34, U.N. Doc. A/RES/32/34 (November 28, 1977) (16 for: 2 against); G.A. Resolution 33/39, U.N. Doc. A/RES/33/39 (December 13, 1978) (16 for: 3 against); G.A. Resolution 34/40, U.N. Doc. A/RES/34/40 (November 21, 1979) (15 for: 5 against); G.A. Resolution 35/27, U.N. Doc. A/RES/35/27 (November 11, 1980) (15 for: 8 against); G.A. Resolution 36/50, U.N. Doc. A/RES/36/50 (November 24, 1981) (16 for: 10 against); G.A. Resolution 37/30, U.N. Doc. A/RES/37/30 (November 23, 1982) (13 for: 9 against). Additionally, the latter two resolutions, passed in 1981 and 1982 made no reference to Article II of the UN Charter; instead they focused on the humanitarian aspects of the conflict.

41 *See* G.A. Resolution 37/30, ¶ 1 (1975).

42 For example, Report from the Permanent Mission of Portugal to the United Nations Secretary General, U.N. Doc. A/52/152 (May 19, 1997).

43 Wedgwood (2001); United Nations. Dept of Public Information (2000, p. 6).

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domestic affairs back to the East Timorese (*id.*, p. 6). If voters rejected this plan, East Timor could become independent (*id.*, p. 7). On August 30, 1999, 78 percent of the voters opted for independence.[44] East Timor became independent on May 20, 2002.[45]

2.3 Indonesia's Settlement Policy and Article 49(6) Violations

Neither the UN governing bodies nor their European counterparts have ever formally accused Indonesia of violating the prohibition against civilian population transfers. While the international community has been involved in the post-conflict administration of justice in East Timor—creating a special tribunal to investigate crimes committed during Indonesian rule—the transfer of settlers was not among them.[46] However, the applicability of the Fourth Geneva Convention's rules on occupation—in light of the international armed conflict (between Indonesia and Portugal)[47] and subsequent occupation (Saul 2009, pp. 104–105; Dubler 2010, p. 10)—does not seem in doubt (see, e.g., Unrepresented Nations and Peoples Organization 1992, p. 36; Goebel 1993, pp. 8–10; Benvenisti 2012, 172–177).

Before the Indonesian invasion in 1974, the East Timorese population numbered somewhere between 635,000 and 689,000 persons.[48] By 1980, the indigenous population in East Timor is estimated to have dropped by approximately 15 percent, to 560,000 persons (*id.*, pp. 591–592).[49] An Indonesian census puts the population of East Timor back near 650,000 a mere seven years later, but this number "clearly includes Indonesian transmigrants" who arrived in the territory during that period (*id.*, pp. 591–592).

44 Press Release, Secretary-General, People of East Timor Reject Proposed Special Autonomy, Express Wish to Begin Transition to Independence, Secretary-General Informs Security Council, U.N. Doc. SG/SM/7119 SC/6722 (September 3, 1999) (announcing that of the 451,792 registered voters, 344,580 or 78.5 percent rejected the proposed special autonomy plan while 20.1 percent voted for integration).

45 *See* Report of the Secretary-General to the Security Council on the United Nations Transitional Administration in East Timor, U.N. Doc. S/2002/432 (April 17, 2002).

46 *See* Security Council Res. 1272.

47 *See* Saul (2009, pp. 85–89) (concluding that the Indonesian invasion created an international armed conflict); Dubler (2010, p. 10) (same).

48 *See* Kiernen (2003, p. 590) (comparing Portuguese census estimates with those taken by the Catholic Church and observing problems with each study).

49 The low population is also attributable to famine and the departure of refugees (*id.*, p. 593).

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Transmigration within Indonesia proper was an established government policy at the time, and it continues on a smaller scale today.[50] Transmigration is essentially a program of internal relocation. Because its population is highly concentrated (in 1980, e.g., 61 percent of the Indonesian population lived on the island of Java, which comprises only 7 percent of the country's land (Hardjono 1988, p. 427)), transmigration was seen primarily as an effort to ease severe overpopulation in Indonesia's urban areas. Transmigration was also seen as a "vehicle for nation-building through assimilation and ethnic integration," and as a core component of Indonesia's national security scheme.[51]

Unpopulated areas or areas populated by peoples ethnically different from the Javans were viewed as inherently unlikely to support Jakarta. It was thus the Indonesian Army's position that territorial management must be "implemented by the entire state apparatus."[52] The objective was to manage "the geographical and demographic factors and the ideological-political-social-cultural-military conditions," of an area "in order to create regional strength" and implement defense and security.[53] "Trouble spots" such as East Timor were prioritized as areas most in need of new transmigration settlements.[54]

The Indonesian transmigration program was largely voluntary—at least according to most sources—but with significant levels of government organization, inducement, and support.[55] In order to recruit new settlers during the period of East Timor's occupation, the Indonesian government had branch offices in the capitals of the provinces as well as in larger towns. Employees in these offices were tasked with spreading information about the program throughout their respective jurisdictions (Hardjono 1988, p. 26). Recruiting settlers from interior rural areas required a bit more dedication; "inviting" tribal members to move could take anywhere from three to six months, and those who agreed were given another six months of "guidance and instruction" on the agricultural methods they were expected to implement upon their relocation to new settlements (*id.*).

50 *See* Ministry of Manpower and Transmigration of the Republic of Indonesia, http://www.nakertrans.go.id/.

51 Budiardjo (1986) (quoting Indonesia President Sukarno's Transmigration is A Matter of Life and Death for Nation Building, Department of Information, Jarkata (1964)).

52 *Id.* (quoting Indonesian Brigadier-General Sembiring Meliala).

53 *Id.* (quoting Sembiring Meliala 1984).

54 *Id.*, p. 113 (quoting that statement of Indonesian officials made to an Indonesian newspaper on September 6, 1985). One reason recruits faced particular pressure to resettle in East Timor was because of a government desire to increase the number of Muslims in the predominantly Catholic area.

55 *See* Marr (1990) ("[p]ressure was brought to bear to force homeless people to migrate").

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For East Timor, it was mostly Balinese farmers who were recruited (Budiardjo 1986, p. 115). Although the transmigrants were typically kept in separate villages, away from the "backward thinking" East Timorese, one or two "villages of potential" were populated with an even mix of settlers and locals (*id.*). These encampments were part of a larger government scheme to heavily develop cash crops on East Timor, and received sizeable government investments, ran largely on solar energy, and had equipment for employing high-tech farming methods (*id.*).

Frequently, it was the economic incentives that led poor or landless Indonesians to move. On paper, all migrants received "free transportation, a little pocket money, free land [typically five to six hectares] already cleared, and food until the first crop was harvested. Other assistance, which involved a house already constructed, tools, and seed, was to be repaid to the government . . ." (Hardjono 1988, p. 29). Practically, however, assistance given to any individual family varied with the time and place of relocation (*id.*). Land provided might not be cleared as expected or houses not yet built.[56] When the government's provisions fell short or crops failed, the government was obligated to continue helping transmigrants with food and basic necessities for three or four farming seasons (*id.*).

Exact numbers of Indonesian settlers in East Timor are hard to obtain (Kiernen 2003, p. 592). There was also some unaccounted-for migration by Indonesians who moved entirely of their own accord without government sponsorship or knowledge (Hardjono 1988, p. 30). Some figures suggest that approximately 15,000 transmigrants arrived in East Timor between 1980 and 1987 (Kiernen 2003, p. 592), but unofficial, non-government sources estimate that the non-Timorese population living in East Timor in 1997 was as high as 160,000–180,000(Kiernen 2003, p. 597)—nearly 20 percent of the population.[57]

Given these numbers, and the unabashed manner in which Indonesia carried out transmigration, it is notable that neither the UN nor Portugal (which remained a constant and strong critic of Indonesia's occupation) raised the issue of Article 49(6). On the contrary, the Indonesian settlement program received financial backing from not only the World Bank, but also several Western powers (Weaving 1994).

56 *Id.* Or, as was the case in East Timor, the government might misrepresent the realities of transmigrant life (Hardjono 1988, pp. 26–27).

57 Columbia University's International Conflict Resolution Program forecast the East Timor population in 1997 to number approximately 881,600 (Pederson & Arneberg 1999).

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2.4 Transitional and Post-conflict Treatment of Settlers

In advance of independence, East Timorese rebel leaders assured the international community that Indonesian settlers would not be expelled.[58] Indeed, pro-Timorese NGOs urged the Timorese to go further and guarantee that "Indonesian migrants would be protected," for their home country "could not be expected to abandon its citizens to anarchy and revenge."[59] The possibility that the settlers would have to be withdrawn by Indonesia itself was not raised by anyone. Many settlers (those born in East Timor or otherwise qualified) could vote in the referendum on independence as well as[60] in the election for the body responsible for drafting the first East Timorese constitution and the formation of an all-East Timorese Council of Ministers.[61]

The United Nations-led transitional regime created two mechanisms for post-conflict justice—a special mixed criminal tribunal with jurisdiction over crimes committed in the 1999 conflict that lead to Timorese independence, and a truth and reconciliation committee, which had authority to deal with human rights abuses and violations of the Geneva Conventions during the entirety of the occupation.[62] The Commission's 2,500-page report on Indonesian crimes makes no mention of Article 49(6) or settlement as a crime.[63]

Nonetheless, the domestic citizenship laws adopted by independent East Timor, effective November 2002, largely exclude settlers from automatic citizenship. Section 8(1) of East Timor's 2002 Nationality Law provides original East Timorese citizenship to anyone born in the national territory *to a parent born in East Timor*, stateless parents, or to parents whose citizenship is unknown; or anyone who is born in the national territory to a foreign parent if, being over 17 years old, the person declares him or herself an East

58 Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Summary Record of the 1475th Meeting, para 17, A/AC.109/SR.1475 (24 February 1999).

59 A/AC.109/SR.1489, 2 (1 July 1999).

60 UNTAET Regulation 2001/2, On the Election of a Constituent Assembly to Prepare a Constitution for Independent and Democratic East Timor § 30 (16 March 2001).

61 *See* Report of the Secretary-General to the U.N. Security Council ¶ 4, U.N. Doc. S/2001/983 (October 18, 2001).

62 UNTAET Reg. 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, Art. 1(c)–(d), 3.1(a)–(d).

63 Timor-Leste Commission for Reception, Truth and Reconciliation, *Chaga Report*, Chapter 7.3: Forced Displacement and Famine, paras 279, 289 (noting Indonesian transmigration in passing, without attaching any legal or ethical significance to it) (2005), available at http://www.cavr-timor-leste.org/chegaFiles/finalReportEng/07.3-Forced-Displacement-and-Famine.pdf.

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Timorese.[64] Such provision is likely to preclude automatic East Timorese nationality for most children of settlers because only those children born in East Timor before 1985 would be able to take advantage of the law's declaration provision in 2002.

It is likewise difficult for transmigrants to acquire East Timorese citizenship as the East Timor Nationality Law contains stringent naturalization requirements, including daunting language and cultural knowledge requirements.[65] While the Nationality Law does emphasize that a "foreign citizen who has settled in Timor-Leste as a result of transmigration policy or foreign military occupation shall not be considered as a usual or regular resident,"[66] and East Timor's Immigration and Asylum Act specifies that such persons must obtain a visa from the Minister of the Interior in order to lawfully remain in the country long enough to become a naturalized citizen,[67] non-indigenous persons have been deported from East Timor in only isolated instances (see, e.g., U.S. Dept. of State 2005).

There has been no suggestion by any international authority that the Indonesian government should pay either the East Timor government or East Timorese nationals for land taken by settlers. East Timor's first President, Xanana Gusmao, and his supporters overrode calls for reparations from factions within East Timor in an effort to build and maintain friendly relations with Indonesia (e.g., Townsville Bulletin 2001, p. 14).

2.5 Summary

The Indonesian occupation of East Timor involved a large-scale settlement enterprise run in a highly organized manner by the occupying power. Its goals were explicitly to change the demographic balance in the occupied territory, and to exploit it for economic purposes. Despite the scale and public nature of the project, no state or international organization—or the post-conflict justice mechanism—criticized the settlement program, let alone

64 Law No. 9/2002 on Citizenship (Timor-Leste), 9/2002, 5 Nov. 2002, Art. 8(1)(a)–(c) (unofficial translation by UNTAET) (*hereinafter* East Timor Nationality Law), available at http://www.unhcr.org/refworld/country,,NATLEGBOD,,TMP,4562d8cf2,3dd8de914,0.html. A child born overseas to an East Timorese mother or father is also a citizen of East Timor. *Id.* §8(2).

65 *Id.*, §12(1).

66 *Id.*, §12(2).

67 See Immigration and Asylum Act (East Timor) Art. 131, ¶¶ (1), (2), Law No. 9/2003, 15 Oct. 2003, available at http://www.unhcr.org/refworld/docid/3fc75cd32.html ("Foreigners who entered the country after September 7, 1975, and who are conducting activities in the national territory for which under the present provisions it is mandatory to be a resident or holder of a proper visa, must . . . request a visa that will allow them to stay . . . .").

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characterized it as a violation of the Geneva Conventions (despite the fact that many international actors were otherwise highly critical of Indonesia's occupation, and denounced its control of East Timor as illegal).

There was no suggestion that Indonesia should or must repatriate its settlers, and indeed it did not. The UN's treatment of the Indonesian settlers during East Timor's transition to independence further supports this proposition. Many settlers were allowed to vote in the referendum on the continuation of Indonesian rule. While Indonesian settlers were allowed to stay, most could do so only as resident aliens, not Timorese citizens.

3. WESTERN SAHARA (SADR)

3.1 History of the Conflict

Western Sahara (or the Saharawi Arab Democratic Republic—SADR) is located in northwest Africa. The territory is approximately the same size as Colorado[68] and is bordered by the Atlantic Ocean on the West, Morocco to the North, Algeria to the northeast, and Mauritania to the south and east (Damis 1983, p. 1; Geldenhuys 2009, p. 190). From the late 19th century until 1975, Western Sahara was a Spanish colony (Geldenhuys 2009, pp. 190–193). As early as 1960,[69] however, Spain began facing significant international pressure to decolonize the territory in favor of the self-determination of the indigenous Saharawi people.[70]

The first Saharawi liberation movement began in 1968 (Geldenhuys 2009, pp. 191–192) and the Frente Popular para la Liberacion de Saguia al Hamra y Rio de Oro (POLISARIO Front), the most important independence faction, was established in 1973.[71] POLISARIO mounted its first attack on the Spanish military only ten days after its founding (Thobhani 2002, p. 48) and, in the

68 CIA, The World Factbook, https://www.cia.gov/library/publications/the-world-factbook/fields/2023.html. Western Sahara is approximately 252,120 km^2. Geldenhuys (2009).

69 The UN adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960. G. A. Resolution 1514 (XV), U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960).

70 For example, G.A. Resolution 2072 (XX), U.N. Doc. A/RES/2072(XX) ¶ 2 (Dec. 16, 1965) (urgently requesting the Government of Spain immediately take all necessary measures to liberate Western Sahara); G.A. Resolution 2229 (XXI), U.N. Doc. A/RES/2229(XXI) ¶¶ 1, 4 (Dec. 20, 1966) (reaffirming the right of the people in Western Sahara to self-determination and inviting Spain to hold a referendum under UN auspices at the earliest possible date).

71 *Id.*, p. 192. During its first two years, POLISARIO operated out of Mauritania, which provided material support to the fight against Spain (Damis 1983, pp. 38–42).

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face of continued harassment, Spain announced its intention to hold a referendum on the future of Western Sahara in the first half of 1975.[72]

Immediately after Spain's announcement, Morocco stated that it would not accept any referendum that included an option for Western Saharan independence (Theofilopoulou 2006). Instead, Morocco suggested, together with the government of Mauritania, that the ICJ issue an advisory opinion establishing the pre-colonial status of the Western Sahara.[73] Morocco claimed that it had displayed public, uninterrupted, and uncontested sovereignty over Western Sahara for several centuries, which entitled the Moroccan monarchy to "immemorial possession" of the territory (Western Sahara, Advisory Opinion 1975). Mauritania, for its part, argued that the people of the Western Sahara shared historical, religious, linguistic, cultural, and legal ties with its own population and that the two peoples were thus a single nation before the Spanish and French invasions (*id.*, ¶¶ 135–139).

Contrary to these positions, the ICJ found that neither country could establish ties of territorial sovereignty over Western Sahara (*id.*, ¶ 162). Instead, the ICJ ruled that it was a separate territory, and its inhabitants, the Saharawi, had a right to self-determination, and potential independence. The same day the opinion was issued, Moroccan King Hassan II announced the organization of a Green March. The plan envisioned Moroccan citizens walking from Morocco into Western Sahara on a "pilgrimage" that symbolized the Moroccans' dedication to a united Moroccan kingdom (Thobhani 2002, pp. 50, 56–57). Despite serious logistical hurdles,[74] the Green March took place just three weeks later on November 6, 1974, when as many as 350,000 Moroccans entered the Western Sahara, including tens of thousands of Moroccan troops (*id.*, p. 57; Geldenhuys 2009, p. 193). The Security Council immediately denounced the march and called on Morocco to withdraw its people, an instruction with which Rabat never fully complied.[75]

72 Letter dated 20 August 1974 from the Permanent Representative of Spain to the UN Secretary-General, U.N. Doc. A/9655 (1974).

73 Letter dated 23 September 1974 from the Minister of Foreign Affairs of Morocco to the Minister for Foreign Affairs of Spain, UNU.N. Doc. A/9771, at Annex (1974) (threatening to mobilize to prevent Western Sahara's independence); http://www.un.org/en/ga/search/view_doc.asp?symbol=A/9771; Statement of the Minister for Foreign Affairs for the Islamic Republic of Mauritania to the General Assembly, UNU.N. Doc. A/PV.2251 (October 2, 1974).

74 King Hassan specified the number of Moroccans that would be allowed to participate from each part of the country and then had to move all marchers to a central location (*id.*, p. 55).

75 S.C. Resolution 380 (1975) ¶ 2, U.N. Doc. S/RES/380(1975) (November 6, 1975).

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For three days after the march subsided, Morocco, Mauritania, and Spain secretly negotiated Western Sahara's fate.[76] On November 14, 1974, the countries announced their agreement (the Madrid Accord): an interim tripartite government representing the three signatory states was to be established immediately.[77] Then, when Spain withdrew from the territory in February 1976, Morocco and Mauritania would bear joint responsibility for Western Sahara's administration.

The UN's response to the Madrid Accord was mixed. First, the General Assembly passed Resolution 3458(A), which again called on Spain to supervise a free and genuine act of Western Saharan self-determination.[78] But that same day the UN passed Resolution 3458(B), which recognized the Madrid Accord, requested that the interim administration respect the aspirations of the Saharan population, and consult with a representative of the UN to ensure the Saharan population could exercise its inalienable rights.[79]

When the Spanish left Western Sahara in late February 1976, Moroccan military and civilian personnel assumed control (Thobhani 2002, p. 58). King Hassan, claiming the consent of the Saharawi people, decided to partition and annex Western Sahara between Morocco and Mauritania. The POLISARIO declared Western Sahara's independence later that same day.[80]

3.2 Moroccan Occupation and International Reactions

In the beginning, the POLISARIO fighters experienced a measure of success, staging several effective attacks against occupying forces and even striking blows inside Moroccan and Mauritanian borders (Geldenhuys 2009, p. 195). The costs of the war began to wear on Mauritania and by 1979 it had withdrawn its troops and renounced all territorial claims over Western Sahara.[81]

76 *See* Geldenhuys (2009, p. 193) (observing that the negotiations were "decidedly conspiratorial"). Although the official agreement was only six paragraphs long and contained no mention of Western Sahara's partition, it is widely reported that a second, secret agreement setting forth a division of Western Saharan territory and assets was also made (*e.g.*, Franck 1976, nn. 135, 136).

77 Letter from the Permanent Representative of Spain to the United Nations Secretary-General (November 18, 1975), annexed to Third Report by the Secretary-General in Pursuance of Resolution 379 Relating to the Situation Concerning Western Sahara, Annex II, U.N. Doc. S/11880(1975) (November 19, 1975) (*hereinafter* the "Madrid Accord").

78 G.A. Resolution 3458(A) (XXX) ¶¶ 1–3, 5, U.N. Doc. A/RES/3458(XXX) (Dec. 10, 1975).

79 G.A. Resolution 3458(B) (XXX) ¶¶ 3, 4, U.N. Doc. A/RES/3458(XXX) (Dec. 10, 1975).

80 Proclamation of the First Government of the Saharawi Arab Democratic Republic (February 27, 1976), *reprinted in* Struggle of the Saharawi, pp. 194–195; *see also* Franck (1976, p. 718 n.168); Geldenhuys (2009, p. 194). The SADR was to be ruled by an eight-man POLISARIO government based in Tindouf, Algeria (Geldenhuys 2009, p. 194).

81 Letter from the Permanent Representative of Mauritania to the U.N. Secretary-General (Aug. 18, 1979), U.N. Doc. A/34/427 (August 20, 1979). The portion of the Western Sahara relinquished by

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Even more impressive than its military victories were POLISARIO's diplomatic achievements. After Mauritania's withdrawal, the UN formally recognized POLISARIO as the representative of the Western Saharan people, adopting a Resolution that declared Morocco an occupying power and reaffirmed the Saharawi's right to self-determination.[82] In fact, in the ten years following the declaration of SADR independence, sixty-seven countries afforded the country *de jure* recognition (Geldenhuys 2009, p. 194) and the SADR was admitted as a full member of the Organization of African Unity.

Beginning in the early 1980s, Morocco began to construct a massive berm around the areas of Western Sahara it controlled (*id.*, p. 196; Thobhani 2002, p. 61). The berm cut off POLISARIO's access to many Western Saharans, preventing it from replenishing its forces with new recruits (see id.). Nonetheless, the POLISARIO, based partly in Algeria, continues to maintain a parallel government with limited recognition, controlling less than 20 percent of Western Sahara's territory (Conrad 2014). While a ceasefire has been in place since 1991, violent attacks by Moroccan authorities on Saharawi protesters continue to occur (Ghanmi 2010).

3.3 Moroccan Settlement Policy and Article 49(6) Violations

While the word "occupation" is rarely used in relation to Morocco's presence of Western Sahara by states and international organizations,[83] there is broad agreement[84] that the situation qualifies as a belligerent occupation. It has been described as such by the UN[85] and more recently the European Court of Justice.[86] As with Indonesia, Morocco has never been accused of violating Article 49(6) by state representatives or international organizations.[87] However, it has engaged in one of the world's most extensive settlement projects.

Mauritania was promptly annexed by Morocco. G.A. Resolution 35/19, ¶ 3, U.N. Doc. A/RES/35/19 (November 11, 1980).

82 G.A. Resolution 34/37, ¶¶ 5, 7, U.N. Doc. A/RES/34/37 (November 21, 1979). The General Assembly continued to pass similarly worded resolutions once a year for ten years thereafter.

83 As memorably demonstrated recently when UN Secretary General Ban Ki-Moon used the term on a visit to Morocco, and promptly expressed his "regret" for doing so (Al Jazeera 2016)

84 *See* Kontorovich (2015, pp. 611–612 and nn. 146–147) (describing academic and governmental consensus regarding the status of the territory).

85 *See* U.N. Secretary-General, The Situation Concerning Western Sahara: Report of the Secretary-General, ¶ 16, U.N. Doc. S/21360 (June 18, 1990); G.A. Res. 34/37, U.N. Doc. A/RES/34/37 (November 21, 1979).

86 *See Front Polisario v. European Commission*, ECJ (General Court) case T-512/12, paras 13, 76 (December 10, 2015).

87 While scholars have rarely addressed the issue, those who do tend to find the provision violated. For example, a report on the Western Saharan issue by the Parliamentary Assembly of the Council of

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Since its invasion in 1976, "Moroccanization" of the Western Saharan population has been official Moroccan public policy.[88] Over the past 30 years the Moroccan government has spent as much as $2.4 billion on Western Sahara's basic infrastructure, building airports, harbors, roads, and electricity plants (Geldenhuys 2009, p. 196). The Moroccan government has offered higher salaries in order to incentivize settlers to move to the Western Sahara (Durch 1993, p. 164). Salaries in the occupied territory are twice what they would be in Rabat (Mundy 2006, p. 262). Jobs in the lucrative state-controlled extractive industries go primarily to Moroccan settlers. They have received controlling stakes in companies that manage the highly lucrative fishing industry that operates off Western Sahara's coast (*id.*, 263).

The Moroccan government also offers free or low-cost housing and subsidies on basic commodities such as food and oil to its citizens (Thobhani 2002, p. 12). Settlers are also largely exempt from taxes. A reporter observed in 1991: "The first thing which strikes the visitor to el-Ayoun, the capital of Western Sahara, is the number of smart new apartment blocks and residential districts which have been built around it" (Dowden 1991, 14). In the months leading up to the anticipated 1991 referendum on independence, an estimated 170,000 persons were bribed or forced to move to Western Sahara in an effort to stack the vote (*id.*; Kirby 1991, p. 13).

By devoting huge amounts of resources to the territory, Morocco developed what was in effect a Western Saharan "affirmative action policy" (Cherkaoui 2007, p. 179)—and that policy achieved success.[89] In 1974, two years prior to the joint Moroccan/Mauritanian occupation, Spain conducted an official census that counted approximately 74,000 adult Saharawi living in the Western Sahara. It is estimated that as a result of the violence during 1975

Europe makes no mention of the settler issue at all. PACE Committer on Political Affairs, Parliamentary Contribution to Resolving the Western Sahara Conflict, Doc. 13526 06 (June 2014). The issue of Moroccan violations of 49(6) has been raised by a few scholars. *See e.g.*, Farah (2003, p. 23) and Smith de Cherif (1991, p. 54). Major human rights groups, however, have not treated the settlers as constituting a 49(6) violation. *See* Human Rights Watch (2015, p. 24 n. 21) (noting the transfer of settlers in passing but not describing it as illegal).

88 Lippert (1987, p. 53) ("Rabat's intention was to create an irreversible reality that would compel the international community to acknowledge Moroccan sovereignty over Western Sahara as a *fait accompli.*"); Geldenhuys (2009, p. 199).

89 Because of their nomadic, tribal nature, the lack of reliable, identification documents, and other means of proving lineage, data regarding the Saharawi population is often heavily contested. Where possible, discrepancies are noted.

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and 1976 anywhere from one-half to one-third of this population fled to Tindouf, Algeria.[90]

The population estimates for the native Saharawi living in Western Sahara between 1976 and 2000 vary significantly. Morocco conducted a census in 1994 that put the total population of Western Sahara at approximately 213,000,[91] yet only 151,000 residents were registered to vote in the local Moroccan elections held five years later (San Martín 2004, p. 653). Both counts are likely flawed. Official population estimates in less developed countries tend to be inflated[92] and this observation is likely to be especially true for the Moroccan government, which would want the census to indicate a thriving Western Sahara population. On the other hand, it seems reasonable to conclude that the 1999 voter registration list excluded Saharawi who did not wish to validate the Moroccan occupation by participating in local elections; accordingly, it may underestimate the number of Western Saharan residents. If, nonetheless, the 1999 voter registration list is a good proxy for the area's total population—and if the voter identification criteria specified in the UN's 1991 Peace Plan (discussed below) enabled UN administrators to accurately identify all native Saharawi and their descendants—then in 1999, at least 55 percent of the Western Saharan population were non-native settlers (San Martín 2004, p. 654). A more recent report suggests that Moroccan settlers in Western Sahara outnumber the Saharawi by two to one.[93]

3.4 (Proposed) Transitional and Post-conflict Treatment of Settlers

The first formal settlement proposals, finalized in 1991, contemplated a UN-led referendum that would provide voters with two choices: independence or integration.[94] Both parties agreed that the 1974 Spanish census would be the basis

90 Damis (1983, p. 93). *Cf.* Thobhani (2002, p. 104) (noting that in the aftermath of the Moroccan takeover writers have placed the number of Saharawi refugees at anywhere between 12,000 and 150,000). According to one report, by 1987, refugees in Algerian camps numbered somewhere between 165,000 and 200,000, while approximately 60,000–70,000 Saharawi remained in occupied SADR (behind the wall). Lippert (1987, p. 47).

91 "Regions of Morocco," Administrative Divisions of Countries ("Statoids"), http://www.statoids.com/uma.html.

92 "Explanation of Listings," Administrative Divisions of Countries ("Statoids"), http://www.statoids.com/info.html#psd (last visited Dec. 18, 2009).

93 The Economist (2007). The CIA World Factbook puts the SADR's population today at just over 405,000. Western Sahara, CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/wi.html.

94 The 1991 settlement proposals are detailed in two lengthy reports of the Secretary-General. Report of the Secretary-General on the Situation Concerning Western Sahara, U.N. Doc. S/21360 (June 18,

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for the voter registration list, thus excluding settlers.[95] Nonetheless, debates about the details of voter qualifications broke out almost as soon as the sides agreed to a referendum,[96] and this prevented the United Nations Mission for the Referendum in Western Sahara (MINUSRO)[97] from successfully operating throughout much of the 1990s.[98] Eventually, the UN Security Council recognized that the referendum scheduled to take place that year was no longer viable.[99]

In May 2003, the UN Security Council endorsed a new plan for Western Sahara. Baker Plan II (named after former U.S. Secretary of State James Baker, the Secretary-General's Personal Envoy to Western Sahara) contemplated a four- to five-year interim Western Sahara government followed by a referendum.[100] There were only two categories of people who would be eligible to vote for the transitional government: (i) persons aged 18 years or over and whose names appeared on MINURSO's approved voter list as of December 30, 1999 (exclusive of those persons objecting to or seeking appeals from the process); and (ii) persons aged 18 years or over whose names appeared on the UNHRC's repatriation list as of October 31, 2000 (Report of the Secretary-General on the Situation Concerning Western Sahara 2003, annex II).

1990); Report of the Secretary-General on the Situation Concerning Western Sahara, U.N. Doc. S/22464 (April 19, 1991). U.N. Doc. S/21360, *supra*.

95 This formulation left neither side entirely content. Morocco claimed that the many Western Saharans who left for Morocco during the Moroccan-sponsored uprising against the Spanish in the 1950s should be entitled to vote, while POLISARIO wanted to strictly limit the referendum participants to those who could prove ties with the territory in 1974. Dunbar, *supra* note at pp. 527–528; *see also* Report of the Secretary-General on the Situation Concerning Western Sahara ¶ 15, U.N. Doc. S/25170 (January 26, 1993).

96 Report of the Secretary-General on the Situation Concerning Western Sahara, Annex ¶ 6, U.N. Doc. S/25170 (January 26, 1993).

97 *See* S.C. Res. 691 (1991) (establishing UN agency to supervise the referendum and transitional period).

98 MINURSO, Identification of Eligible Voters, http://www.minurso.unlb.org/IDC.html; Report of the Secretary-General on the Situation Concerning Western Sahara ¶¶ 6, 8–11, U.N. Doc. S/1999/1219 (December 6, 1999); Report of the Secretary-General on the Situation Concerning Western Sahara ¶¶ 25–29, U.N. Doc. S/2000/131 (February 17, 2000).

99 Security Council Resolution 1309 (2000), U.N. Doc. S/RES/1309 (2000) (July 25, 2000) (reaffirming its support for a West Saharan referendum but nonetheless encouraging the parties to reach a political solution).

100 Report of the Secretary-General on the Situation Concerning Western Sahara, annex II, ¶ 2, U.N. Doc. S/2003/565 (May 23, 2003). Under this second plan it was expected that the referendum would have three options: independence, integration, and "autonomy," which would essentially constitute a continuation of the interim power-sharing arrangement set forth in the Baker Plan.

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The eligibility criteria for referendum voters, on the other hand, included a significantly broader swath of the territory's population. In addition to the two lists of persons eligible to vote for the transitional government, any persons residing in the territory continuously since December 30, 1999 would be entitled to vote (Report of the Secretary-General on the Situation Concerning Western Sahara 2003, annex II, ¶ 6). Under this criterion a majority of Moroccan settlers in Western Sahara would be eligible to vote on independence.

The "settler provision" of Baker Plan II provoked some criticism. According to critics, the plan demonstrated that the UN was claiming to reaffirm its "commitment to provide for the self-determination of the people of Western Sahara, even while it seriously compromised on [that principle]" (Williams & Zunes 2003). Others, however, lauded Baker Plan II as "a unique opportunity to resolve the Western Sahara conflict peacefully and permanently . . . through self-determination." That the UN Security Council ultimately chose to endorse Baker Plan II despite the questions raised seems to suggest that it found that the plan accorded with international law.[101] Nonetheless, the Moroccan government rejected the plan in 2004.[102]

Since then, little progress has been made toward a permanent Western Saharan solution.[103] There continues to be no suggestion that the Moroccan government should make reparations for its actions in the territory—including for damages caused by the berm—or that Moroccan settlers should be removed from the area.

3.5 Summary

Morocco's settlement program in Western Sahara is one of the longest, largest, and most ambitious in the world. It involved transporting hundreds of thousands of settlers across a vast desert and implanting them in a difficult and hostile environment, at great expense to the occupying power. It also is one of the most demographically consequential, with the settlers now amounting to a substantial majority of the territory's population. The Moroccan settlers, by their sheer numbers, undermine the possibility of Saharawi self-determination

101 Security Council Resolution 1495 (2003) ¶ 1, U.N. Doc. S/RES/1495(2003) (July 31, 2003) (continuing to strongly support the efforts of the Secretary-General and his Personal Envoy and similarly supporting the Baker Plan for Peace as the "optimal political solution on the basis of agreement between the two parties").

102 Report of the Secretary-General on the Situation Concerning Western Sahara ¶ 36, U.N. Doc. S/2004/325 (April 23, 2004); *see also* Letter from the Minister of Foreign Affairs and Cooperation of Morocco to the Personal Envoy of the Secretary-General (April 9, 2004), annexed to U.N. Doc. S/2004/325, *supra*.

103 *See* Report of the Secretary-General on the Situation Concerning Western Sahara ¶ 4, U.N. Doc. S/2008/45 (Jan. 28, 2008).

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called for by the ICJ, and also exploit the scarce natural resources of the territory. Despite significant interest in the situation, and repeated criticisms of Morocco's presence in the territory, no state or international organization has commented in any way on the settlement policy.[104]

Moreover, the unconsummated UN peace plan for the territory leaves all the settlers in place, and allows them to vote in a referendum. If the international community regarded Morocco's settlement program as illegal, this would be inconsistent with a purported duty to give no recognition or legal effect to a settlement enterprise.

4. NORTHERN CYPRUS

4.1 History of the Conflict

The Mediterranean island of Cyprus has historically been home to a majority Greek and minority Turkish population. The island, just southwest of Turkey, was an Ottoman possession for 300 years until 1878, when it came under British control (*id.*, p. 171). The Greek portion of the population, however, sought *enosis*, or union, with Greece (Michael 2009, p. 23). The British were reluctant to give up the strategically important territory. When Britain contemplated granting independence to the island, it sought to maintain a level of strategic control, while preventing Turkish or Greek dominance. One possible solution was a partition of the island (*id.*, p. 23). After nearly five years of negotiations, a different solution was reached: Cyprus would become an independent state (Tamkoç 1988, p. 71), but with some limitations: the island's territorial and political independence would be safeguarded by the joint efforts of Britain, Turkey, and Greece.

Embodied in five documents,[105] the agreement required the new republic to refrain from any political or economic association with another state that would be likely to result in either partition of the island or union of the island with

104 Report on the Kingdom of Morocco's Violations of the International Covenant on Economic Social and Cultural Rights in the Western Sahara 3, 13 (2015) (noting that UN's Committee on Economic, Social, and Cultural Rights "repeatedly denounced Israel's settlement policies, yet it has remained silent on Morocco's decades-long policy of moving Moroccan settlers into Western Sahara" and that its treatment of Israel is not "consistent"), available at http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/MAR/INT_CESCR_CSS_MAR_21582_E.pdf.

105 *See* Treaty of Guarantee, Cyp.-Gr.-Tur.-U.K., August 16, 1960; Treaty of Alliance, Cyp.-Gr.-Tur., August 16, 1960; Treaty Concerning the Establishment of the Republic of Cyprus, Cyp.-Gr.-Tur.-U.K., August 16, 1960; Const. of Cyprus (1960); Basic Structure of the Republic of Cyprus, Cyp.-Gr.-Tur.-U.K., February 11, 1959 (forming the basis of the Constitution of Cyprus). The treaties, found to be of integral importance to the state's structure, are also accorded constitutional status. Const. of Cypus, annexes 1–3.

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such state (i.e., it prohibited formal association with Greece or Turkey)(Treaty of Guarantee, Article 1). In return, Britain, Turkey, and Greece would ensure the preservation of Cyprus's constitutional order (*id.*, Article 2). Turkey and Greece were responsible for defending Cyprus and each was allowed to station troops on the island to fulfill this purpose.[106] Britain was given sovereignty over two military bases on the island and agreed to cooperate with Greece and Turkey for the island's defense.[107] Additionally, the three governing countries agreed to consult one another in the event that either Cyprus community took steps toward partition or union; if no consensus regarding a course of action could be reached, each reserved the right to act independently in order to restore the status quo (Treaty of Guarantee, Article 4).

In December 1963, a yearlong eruption of intercommunal violence (the so-called "Bloody Christmas" of which the Turks were the primary victims) brought about "a political, social, and demographic separation" between the two communities (Michael 2009, 27). The all-Greek Cypriot government sought to amend the 1960 constitution's ethnic power-sharing arrangements. In July 1974, Cypriot President Makarios was deposed in a coup plotted by Greek military leaders (*id.*). Five days after the coup, Turkish troops invaded the island (Chrysostimides 2000, p. 117). Over the next three weeks 35,000–40,000 Turkish soldiers took control of approximately 36.4 percent of the island's territory, leading the vast majority of Turkish Cypriots in the south to flee north and any Greek Cypriots in the occupied northern area to flee south.[108]

Seven months after the invasion, in February 1975, the Turkish administration unilaterally deemed the northern portion of the island a "Federated Turkish State."[109] Finally, in 1983, the Turkish Cypriot community declared formal independence as the Turkish Republic of Northern Cyprus (TRNC).[110] Today, after five rounds of UN-led negotiations and almost four decades of disagreement, the Turkish military has yet to withdraw and the parties remain at loggerheads.

106 Treaty of Alliance, *supra* note 105, Art. 1–2. Greece and Turkey were allowed 950 troops and 650 troops, respectively. *Id.*, Add'l Protocol No. 1.

107 Treaty of Guarantee, *supra* note 105, Art. 3. Treaty Concerning the Establishment of Cyprus, *supra* note 105, Art. 1 & annex A.

108 Hoffmeister (2006, p. 37); the Turkish invasion created an estimated 200,000 refugees (Michael 2009, p. 39).

109 U.N. Security Council Resolution 367 (1975) ¶ 2, U.N. Doc. S/RES/367 (March 12, 1975).

110 Declaration of Independence by Turkish Cypriot Parliament on 15 November 1983, *appended to* Letter from the Permanent Turkish Representative to the U.N. addressed to the Secretary-General, U.N. Doc A/38/586 (November 16, 1983).

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The international community has overwhelmingly rejected Turkey's position that the Treaty of Guarantee provides a basis for its unilateral military action,[111] to say nothing of its continued control of the island. Shortly after the invasion, the UN Security Council adopted a resolution "demand[ing] an immediate end to foreign military intervention in the Republic of Cyprus . . . ."[112] The UN likewise asked all parties involved in the dispute to "refrain from any action which might prejudice [Cypriot] sovereignty, independence, territorial integrity and non-alignment, as well as from any attempt at partition of the island or its unification with any other country."[113] The UN also declared the TRNC's subsequent declaration of independence to be invalid, and called upon other states to similarly refrain from recognizing any Cypriot state other than the Republic of Cyprus.[114] Only Ankara has recognized the TRNC.[115]

4.2. Turkey's Settlement Policy and Article 49(6) Violations

4.2.1. Issues in Counting Settlers

The presence of Turkish settlers in the TRNC is "an undisputed fact,"[116] which has been repeatedly noted by the European Court of Human Rights (ECHR).[117]

111 Hoffmeister (2006, p. 42) (citing Greek opinion).

112 U.N. Security Council Resolution 353 (XXIX), U.N. Doc. S/RES/353 (1974) (July 20, 1974); *see also* U.N. Security Council Resolution 360 (XXIX), U.N. Doc. S/RES/360 (1974) (August 16, 1974) (recording "its formal disapproval of the unilateral military actions undertaken against the Republic of Cyprus").

113 U.N. Security Council Resolution 367 (1975) ¶ 1, U.N. Doc. S/RES/367 (Mar. 12, 1975).

114 U.N. Security Council Resolution 541 (1983), U.N. Doc. S/RES/541 (1983) (November 18, 1983); *see also* U.N. Security Council Resolution 550 (1984), U.N. Doc. S/RES/550 (1984) (May 11, 1984) (condemning "all secessionist actions, including the purported exchange of ambassadors between Turkey and the Turkish Cypriot leadership" and declaring them "illegal and invalid").

115 Strange (2004); *see also* Parliamentary Assembly of the Council of Europe Resolution 816 (1984), *available at* http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta84/eres816.htm ("Deploring the illegal declaration by the leaders of the Turkish Cypriot community, . . . and regretting that these leaders have ignored numerous appeals from the international community to revoke their declaration of 15 November 1983 . . . ").

However, since the proposed UN plan failed in 2004 (see discussion *infra*), the TRNC has been upgraded from an observing "community" within the Organization of the Islamic Conference (OIC) to an observing "state." *See* Cyprus and the Organization of Islamic Conferences, 2007, http://www.mfa.gov.cy/mfa/embassies/embassy_doha.nsf/misc_en/52D53EC97ACC4A52432572CC003B9E90?OpenDocument. Additionally, although it has yet to officially recognize the Turkish Cypriot state, Azerbaijan has opened a representative office in the TRNC.

116 The Demographic Structure of Cyprus, Report of Alfons Cuco, Committee on Migration, Refugees and Demography to the Parliamentary Assembly of Europe ¶ 104, Doc. No. 6589, Apr. 27, 1992 (hereinafter "Cuco Report").

117 *Case of Cyprus v. Turkey*, Application no. 25781/94, paras 28, 522, 299 (Judgment) (2001). The Court did not consider the legality of the implantation of settlers, but did find their presence

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According to the first census after the independence in 1960, the island was home to a population of 573,566 Cypriots, of whom 442,138 (77.1 percent) were Greek Cypriots and 104,320 (18.2 percent) were Turkish Cypriots (Cuco Report 1992). By 1974, the island's population had increased to 641,000, but the demographic ratio of the island remained essentially stable (506,000, or 78.9 percent, were Greek Cypriot and 118,000, or 18.2 percent, Turkish Cypriot) (*id.*, ¶ 35).

After the 1974 invasion, the island's demographics changed rapidly. An estimated 20,000 Greek Cypriots are said to have emigrated immediately following partition (*id.*, ¶41). Moreover, roughly 140,000 Greeks fled or were forced out of the occupied territory following the invasion. At the same time, the Turkish population increased steadily and grew 28 percent in the five years following the invasion (*id.*, ¶ 42). The increase in the north during this period is not attributable to births alone and is generally acknowledged to be the result of an influx of Turkish settlers (*id.*).

The next thirty years saw the Turkish population in Northern Cyprus grow even larger, with estimates of the number of settlers reaching as high as 160,000–170,000—ironically, roughly equal to the number of Greeks who were displaced from the territory (Freedom House 2008, p. 11).

The precise number of settlers remains a matter of some dispute,[118] but most agree they now represent an absolute majority in the occupied territory (Cuco Report 1992, ¶ 71, 78). Part of the debate is due to a lack of an internationally supervised census, or of any NGOs who actively monitor settlement growth. Part of the debate on numbers is definitional—who counts as a settler. One question is whether children of settlers—born after the "transfer" to the occupied territory—count as settlers. This issue has been neglected in most academic and diplomatic discussions of Article 49(6). On the one hand, the "baby settlers" are not "part of the civilian population" of the occupying power, and were not transferred. On the other hand, their birth is to some extent an indirect consequence of the original transfer.[119] This issue has been addressed, however, in the Cypriot context, and the consensus appears to be that those born to

connected with a violation of property rights, intimidation, and abuse of Greek Cypriots. *Id.*, pp. 299–301.

118 *See* Colonisation by Turkish Settlers of the Occupied Part of Cyprus, Report of Jaakko Laakso, Committee on Migration, Refugees and Demography to the Parliamentary Assembly of Europe, ¶ 25, Doc. No. 9799, May 2, 2003 (hereinafter "Laakso Report") (observing "in 2000, the number of the Turkish settlers exceeded the number of the indigenous").

119 The consequence is indirect, because it depends on the settlers having children, and those children choosing as adults to remain in the territory.

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transferees cannot be included in counts of the settler population.[120] As a UK Parliament Foreign Affairs Committee Report put it:

> Many of these so-called 'settlers' were born on the island and know no other homeland . . . They should not be treated as a separate category from the [indigenous] Turkish Cypriots.[121]

A separate question deals with students. Turkey has built ten universities and numerous colleges in the territory, all designed to attract students from outside the territory (Republic of Cyprus Ministry of Foreign Affairs 2006). Indeed, today higher education is one of the Turkish occupation regime's biggest industries. Students at these schools number more than 63,000 (Gusten 2014), the vast majority of whom are from mainland Turkey (Van Coufoudakis 2008), with most of the others from third countries. Similarly, tens of thousands of foreigners, mainly British, have moved to the territory, as part of an active program by occupation authorities to improve Northern Cyprus's economic base. These are routinely not counted in estimates of the TRNC settler population.

4.2.2. Ongoing Waves of Settlers

In the immediate aftermath of the 1974 invasion, three different categories of Turkish settlers migrated to the territory until 1983 became known as Turkish Federated State of Cyprus (TFSC). First came white-collar workers and skilled laborers. This group came to Northern Cyprus to help rebuild its infrastructure (e.g., transportation networks and electricity plants) and to train Turkish Cypriot refugees in tourism, textile manufacture, and agriculture (Hatay 2005, p. viii). Second came Turkish soldiers, who were likewise offered TFSC citizenship. Enacted in 1975 (*id.*), TFSC Citizenship Law No. 3/1975 provided TFSC citizenship to the extended families (wives, children, parents, and siblings) of Turkish soldiers killed during the 1974 invasion, as well as to any person who served in the Turkish Resistance Organization in Cyprus before August 18, 1974 (Republic of Cyprus Ministry of Foreign Affairs 2006; Cuco Report 1992, ¶ 95). The Equivalent Property Law, enacted seven years later, allocated homes and other real property abandoned by Greek Cypriot refugees to all military personnel who chose to remain permanently in northern Cyprus (Laakso Report, ¶ 33).

The third and final group of migrants was made up of unskilled laborers. Many of these former farmers from Turkey's Anatolia region were

120 For example, the UN Human Rights Council differentiates between "Turkish settlers" and "their descendants." *See, e.g.*, Report of the Office of the United Nations High Commissioner for Human Rights on the question of human rights in Cyprus, A/HRC/28/20, para 31 (January 23, 2015).

121 UK Parliament Foreign Affairs Committee (2009).

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underprivileged and landless (Hatay 2005, p. 12; Cuco Report, ¶ 69). After natural disaster struck a rural Turkish village, for example, the newly homeless inhabitants were offered a choice between resettlement in another part of Turkey or in Cyprus (Hatay 2005, p. 12). The Turkish authorities also recruited unskilled labor via radio broadcasts, which recommended agricultural workers interested in moving to Cyprus "apply" to their local TSFC consulate (*id.*). After receiving approval to relocate, these migrants were transferred from their local villages by bus to a Turkish seaport and then taken on to Cyprus (*id.*). Upon arrival, the settlers were temporarily housed in empty schools or hostels, but they were thereafter allocated homesteads based on household size.[122] In addition to the influx of these government-backed migrants between 1974 and 1980, Turkish citizens have continued to settle independently in northern Cyprus (Hatay 2005, p. 13; Cuco Report, ¶ 77).

Turkish settlement activity has continued, and perhaps increased, in recent decades. Settlement activity, which had fallen off in the 1990s, increased considerably around the time of the Annan Plan. According to Turkish demographers (Atasoy 2011, p. 38), this activity has grown rapidly since the rejection of reunification. Roughly 10,000 settlers arrived each year from 2005–2009 (*id.*, p. 39). Other estimates are much higher. The U.S. Ambassador to Cyprus reported in a diplomatic cable that the tide of settlers from Turkey has "reached new heights," with 13,448 coming in 2004 and 18,408 in 2005, and 5,318 in just the first quarter of 2006 (Schlicher 2007). The most recent census information shows an increase in population (11.2 percent per annum from 2006 to 2011) that significantly increases net natural growth, and attests to significant ongoing settlement activity.[123] Indeed, numerous reports attest to a construction boom in Northern Cyprus in recent years.[124] Many large projects are being built to accommodate new arrivals on the island.[125]

Turkey continues to encourage the growth of the settlements. Turkish settlers are exempt from mandatory military conscription. Turkey promotes the growth of the population with major infrastructure projects for the growing population (such as an upgraded airport with flights only to Turkey, and a

122 One commentator reports: "Households with five members received between 100 and 150 donums. For each extra child, there was a 10% increment, but this was not to exceed 50% of the original land allocation" (*id.*, p. 13). Under a 1995 amendment to the Equivalent Property Law, settlers were given land deeds but barred from selling or passing the property to third parties until a period of twenty years has passed (*id.*, 2003, p. 13, n. 30); Laakso Report (2003, ¶ 36).

123 Milliyet (2011).

124 *See, e.g.*, Republic of Cyprus, Ministry of Foreign Affairs (2006a); Veli Şafakali (2011).

125 *See, e.g.*, Emtan Construction: Projects Under Construction, http://www.emtancons.com/en-project-list-ongoing.php.

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direct water supply from the mainland). Moreover, Turkish companies receive exclusive rights to these projects, and to the right to extract fossil resources of the occupied territory.[126]

While the Republic of Cyprus routinely condemns the Turkish settlement enterprise as a war crime (Republic of Cyprus Ministry of Foreign Affairs 2006b), some Turkish Cypriots (those resident on the island before the invasion), also resent the settlers, whom they hold responsible for lower wages.[127] Because the groups also differ in traditions and customs, the settlers are widely viewed as a foreign element by the Turkish Cypriot population,[128] which occasionally leads to violence (Globe & Mail 1978; Cuco Report, ¶ 85). Indeed, tens of thousands of Turkish Cypriots have left the island in response to the influx of mainland settlers.

4.2.3. Turkey's Legal Responsibility

For purposes of the Geneva Convention, the TRNC's actions are imputed to Turkey, because it is the power with effective control over the territory.[129] Thus, the ECHR ruled that *Turkey* violated the European Convention on Human Rights when the TRNC denied a Greek Cypriot access to her property in Northern Cyprus.[130] Although Turkey argued that the TRNC "is a democratic and constitutional State which is politically independent of all other sovereign States" (*Loizidou v. Turkey* 1996, ¶ 51) the ECHR emphasized:

> *[I]n conformity with the relevant principles of international law governing State responsibility*, ... responsibility of a [Party to the European Convention] could [] arise when as a consequence of military action—whether lawful or unlawful—it exercises effective

126 *Turkey to launch oil drilling in KKTC*, Cihan News Agency, Turkey, April 3, 2012, available at http://en.cihan.com.tr/news/Turkey-to-launch-oil-drilling-in-KKTC-CHNjcxMDkzLzM=

127 *Id.*, ¶¶ 70–71. Other sources place the number of settlers—as differentiated from Turkish-originated *temporary residents*—at as little as 32,000 plus offspring (Hatay 2005, p. viii).

128 Recommendation 1608, *infra* note 143, ¶ 3, *but cf.* Cuco Report (1992, ¶ 66, 72, 92); *see also* Sonan (2007, p. 4) (Turkish Cypriots have sought to distinguish themselves from the settlers by "opting for a prioritization of the 'Cypriot' dimension of their identity").

129 Republic of Cyprus, Ministry of Foreign Affairs (2006b) (Turkey has sought to "shift the balance of political power in the occupied part of Cyprus and influence elections in order to ensure that the Turkish Cypriot leadership is kept in line with the policy of the Turkish Government ... To this effect, colonists have been given 'citizenship,' Greek Cypriot properties, 'voting rights,' [] work permits [and] have been organised in political parties"); *see also* Statement of Joseph Schechla, UNPO Report, 29 (1992) ("There are important lessons to be drawn from a comparative analysis of the cases considered. They represent transfer carried out under official state policy and affirmed as 'legal' by more or-less explicit legislation").

130 *Loizidou v. Turkey*, 310 Eur. Ct. H.R. ¶¶ 13–14, 57 (December 18, 1996).

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> control of an area outside its national territory . . . . The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration (*id.*, ¶ 52).

It was therefore not necessary to determine whether Turkey "actually exercise[d] detailed control over the policies and actions" (*id.*, ¶ 56) of the Turkish Cypriot authorities. Rather, it was "obvious from the large number of troops engaged in active duties in northern Cyprus . . . that [the Turkish] army exercises effective overall control over that part of the island;" such control was sufficient to "establish [Turkey's] responsibility for the policies and actions of the TRNC" (*id.*).

The reasoning of the ECHR would seem to apply with equal force to Article 49(6) of the Geneva Convention. It is not disputed that Turkey has provided financial support to Northern Cyprus since at least 1963. Turkey spent nearly US $3.07 billion on Northern Cyprus between 1974 and 2004 alone.[131] It is likewise undisputed that the security of Northern Cyprus is entirely dependent on the presence of Turkish armed forces. In fact, all TRNC security forces, including domestic police and fire brigades, are legislatively subordinate to Turkish authorities (Cuco Report, ¶ 75). But beyond sending money and military—and most important for present purposes—it is (mostly) undisputed that Turkey exerts significant political control over TRNC affairs. Even Turkish officials admit that "relations between Turkey and the TRNC go beyond those of normal bilateral ties."[132]

4.3 (Proposed) Transitional and Post-conflict Treatment of Settlers

Beginning on March 6, 1995, when the EU announced its plan to "incorporate Cyprus at the next stage of its enlargement" (Michael 2009, p. 152) the conflict in Cyprus took on new urgency. Turkey threatened to annex the TRNC if Cyprus was admitted to the EU (*id.*, p. 153) and confrontations between the two Cypriot communities reached a level of violence not seen since the unofficial cease-fire of 1974. Underlying Turkey's reaction was Turkish desire to join the EU and frustration over its inability to do so (*id.*). Once the international

131 Sonan (2007, p. 219). Turkey continues to fund infrastructure-related projects and to pay defense costs for the TRNC. For example, North Adopts Fresh Approach to History, *Turkish Daily News*, January 4, 2008. As further evidence of its financial dependence, the TRNC has adopted the Turkish lira and placed a Turkish national at the head of its central bank.

132 *See, e.g.*, Turkey to Continue Financial Support for TRNC, IPR Strategic Bus. Info. Database (July 13, 2004) (quoting Turkish State Minister Abdullatif Sener).

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community recognized that EU membership could be used to incentivize a Cyprus solution, the UN began renegotiating a settlement among the parties.

Contentious issues included the demilitarization of Northern Cyprus, the right of Greek Cypriots to return to their abandoned property in the north and of Turkish Cypriots to resettle in the south. But the question of the fate of the Turkish settlers played a significant role in the negotiations. Although Greek Cypriots viewed the presence of settlers as illegal, some officials had "no disposition for wrenching expulsions,"[133] but favored financial incentives to facilitate repatriation of the settlers to Turkey (see Tyree 2002, p. A17; Hoffmeister 2006, p. 141). Suggestions that children of illegal settlers should be deemed to hold *jus soli* citizenship, on the other hand, were considered more controversial.[134] In short, the Greek Cypriots desired the removal of settlers, but it did not seem reasonable or practical to remove all of them.

Ultimately, after several rounds of preliminary discussion, the Annan Plan tried to provide a middle ground on the settler issue. The first comprehensive draft of the Annan Plan, unveiled on November 11, 2002, automatically granted Cypriot citizenship to:

(i) Any person who held Cypriot citizenship in 1960 and his or her descendants;
(ii) Any 18-year-old person who was born in Cyprus and has permanently resided in Cyprus for at least seven years;
(iii) Any person who is married to a Cypriot citizen and has permanently resided in Cyprus for at least two years; and
(iv) Minor children of the persons in the above categories who are permanently residing in Cyprus.[135]

Additionally, Annan Plan I allowed up to 33,000 persons who were citizens of the TRNC, but who would otherwise not qualify for Cypriot citizenship, to be naturalized (Basis for Agreement on a Comprehensive Settlement of The

133 Tyree (2002, p. A17); *see also* Hoffmeister (2006, p. 141) (discussing the possibility that Turks not allowed to remain in Cyprus would be able to avail themselves of the applicable alien laws and were not threatened with mass expulsion *ex lege*).

134 *Compare* Hoffmeister (2006) (noting that the President of the Republic of Cyprus House of Representatives believed parentage, as opposed to place of birth, should be the determinative factor in granting Cypriot citizenship), with Population In Northern Cyprus Rises Significantly, Xinhua General News Service, May 6, 2006 (quoting TRNC Prime Minister Ferdi Sabit Soyer as observing: "Those who came to the island 30 years ago and had children who have since then had their own children can be thought of as nothing other than citizens of the Turkish Republic of Northern Cyprus . . . There is no way anyone could describe them as foreigners.").

135 Basis for Agreement ON A Comprehensive Settlement of The Cyprus Problem, Tur.-Gr.-UK-Gr.Cyp.-Tur.Cyp., at Annex III, Attachment 4, Art. 3(1) (November 11, 2002), *available at* http://www.hri.org/docs/annan/Annan_Plan_November2002.html#_Toc24695394.

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Cyprus Problem 2002, Article 3(2); Hoffmeister 2006, p. 119). In short, many tens of thousands of settlers would automatically receive citizenship. The remainder would not be expelled; they would merely be resident aliens. Settlers resident in the territory for at least five years could apply for either financial assistance to relocate to Turkey (Basis for Agreement on a Comprehensive Settlement of The Cyprus Problem 2002, Article 5) or, alternatively, remain as a resident alien in a reunited Cyprus for seven years and then apply for citizenship (Hoffmeister 2006, p. 119). Interestingly, the plan envisaged that the new federal *Cypriot* government would be responsible for the settlers' relocation costs (Pophaides 2009, p. 138). Although Turkey would likely be expected to contribute to the new island's budget, it was by no means the sole bearer of the financial burdens the plan imposed; the plan explicitly recognized that donations from international aid organizations would be necessary to implement its relocation provisions (*id.*).

After agreeing to use the November 2002 proposals as a basis for negotiations, Secretary-General Annan received clarification and settlement demands from each Cypriot community. He then went back to the drawing board and tried to incorporate the desired changes. Two years and four drafts of the Annan Plan later, the number of former Turkish citizens that would have access to Cypriot citizenship was increased to 45,000 and both sides agreed to a longer naturalization period (Hoffmeister 2006, p. 126), requiring nine years residence on the island. Despite the ability to acquire citizenship, some settlers may have been forced to leave the island because of a cap on the number of Turks that could be present in Cyprus at any given time. The Agreement provided: "[F]or a transitional period of 19 years or until Turkey's accession to the European Union, whichever is earlier, Cyprus may limit the right of . . . Turkish nationals to reside in Cyprus if their number has reached 5% of the number of resident Cypriot citizens holding Turkish Cypriot internal constituent state citizenship status."[136] The net result of this was the "great majority of settlers received the right to remain in Cyprus either as citizens or foreign workers, with the possibility of being naturalized as Cypriots in the future".

Annan Plan V, as the final version was called, received heavy criticism in both the academic and political arenas.[137] It was nevertheless put to a vote—in which Turkish settlers participated—on April 24, 2004.[138] While the Greek Cypriot

136 Basis for Agreement on a Comprehensive Settlement of the Cyprus Problem, Tur.-Gr.-UK-Gr.Cyp.-Tur.Cyp., at Main Articles, ¶ 15 (Mar. 31, 2004). An identical limit was placed on Greek nationals (*id.*).

137 *See* Silver (2004, 24); U.N. Doc. S/2004/437, *supra* note 139, ¶¶ 64–65.

138 Statement issued by the Spokesman of the Secretary-General on the outcome of the referenda in Cyprus, Apr. 24, 2004, *annexed to* U.N. Doc. S/2004/437, *supra* note 245.

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community maintained the position that settler voting conflicts with Article 49(6), the community "acknowledged that settler voting in the TRNC [did] not nullify the results of the separate referenda" (*id.*, 184). The Greek Cypriots likewise announced no intention to reject the referenda as "illegal" because of the settler vote if both sides voted to accept Annan V.[139] Nonetheless, the plan failed its electoral test, receiving substantial support among Turkish Cypriots, but being overwhelmingly rejected by the Greek side.

Peace process efforts picked up again with on-again, off-again negotiations a decade later. These culminated in a dramatic ten-day summit convened by UN Secretary-General Antonio Guterres in July 2017. The talks were seen as the last opportunity for a deal between the sides. Yet at the end, Guterres announced that while the parties had moved much closer in their positions, the summit had failed. The "package" settlement that Guterres presented has not been described in detail, but it does not appear that the removal of any Turkish settlers was a major part of the negotiations. The negotiations collapsed over disputes about the future of Turkish forces on a reunified island, as well as questions about borders and government structure.

4.4 Summary

The ongoing Turkish occupation of northern Cyprus constitutes one of the most substantial settlement enterprises today, and is particularly notable in that it takes place within the territory of the European Union. The majority of the territory's population now consists of settlers, with a substantial ongoing influx (which does not appear to be the case in Western Sahara). Settlers have received substantial assistance and incentives from the Turkish government, though the extent of inducement has varied over time. Moreover, the influx of settlers has been at a direct cost of displacement and dispossession of the prior Greek inhabitants.

Despite this, no international organization and no state (aside from the Republic of Cyprus)[140] have described the settlement program as a violation of the Geneva Convention, or otherwise illegal.[141] Similarly, the ICC prosecutor

139 *Id.* (citing a 2005 Turkish study).

140 *See, e.g.*, Cypriot Ministry of Foreign Affairs, Announcement regarding an appeal by individuals to the International Criminal Court (July 29, 2014) (describing Turkish settlements as violations of Geneva Convention and ICC Rome Statute and placing itself "at the disposal" of the Court to provide documentation on the settlement practices), http://www.mfa.gov.cy/mfa/mfa2006.nsf/All/C2EBDDCBD03DC450C2257D240032EA79?OpenDocument.

141 UN G.A. resolutions call for an end to the "occupation" but avoid the issue of settlements. See U.N. General Assembly Resolution 37/253, U.N. Doc. A/RES/37/253 (1983) (May 13, 1983); U.N. General Assembly Resolution 34/30, U.N. Doc. A/RES/37/253 (1983) (November 20, 1979).

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is authorized to—and has been asked by Cypriot refugees—to investigate war crimes on the island dating back to 2002, but apparently the Turkish settlement project has not merited her attention (see Kontorovich 2014).

This is particularly notable because the European Union is an active and consistent critic of what it sees as illegal settlement activity elsewhere, but it has not used similar expressions regarding the legality of Turkish settlement activity in European territory. It is particularly notable that issues of legality under the Geneva Conventions have not been raised, because the Turkish invasion itself, as well as the settler influx, has been subject to criticism. One cannot say the international community overlooked the issue, or that countries were silent for political reasons. Thus, proposals to condemn Turkish settlement activity have repeatedly been raised at in the EU Parliament and other bodies, but have not been adopted. For example, both the UN General Assembly and the Parliamentary Assembly of the Council of Europe have raised the issue of Turkish settlement activities,[142] but have not said they violate international law. Indeed, PACE (the Parliamentary Assembly of the Council of Europe) has suggested that it is a purely political, rather than a legal problem, as it called on the "Turkish-Cypriot administration" to "keep the arrival of aliens . . . under control," as opposed to banning it.[143]

Finally, the fate of Turkish settlers received considerable attention in the UN-backed peace proposals for the island. Despite significant Greek Cypriot insistence on the removal of at least a substantial portion of settlers, the various proposals did not directly require the removal of any settlers, and instead required that the majority receive citizenship in a unified Cyprus, with the remainder being able to stay as residents. That the UN rejected more aggressive removal ideas at the expense of Greek support for the deal again emphasizes the lack of an evident international understanding that such removal is a legal obligation.

142 The European Parliament and Parliamentary Assembly of the Council of Europe have likewise passed resolutions condemning Turkey's failure to address the settler issue. For example, European Parliament Resolution B7-0068/2010 para 35 (February 2, 2010) (calling on Turkey to "address[] the issue of the settlement of Turkish citizens on the island," available at http://www.europarl.europa.eu/sides/getDoc.do?language=EN&reference=B7-0068/2010; Parliamentary Assembly of the Council of Europe Recommendation 1608 (2003), *available at* http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta03/erec1608.htm; Recommendation 1197 ¶ 8; (1992) ¶ 9(ii); *see also* Cuco Report (1992, ¶ 113) (noting similar resolutions of the UNCHR and Conference of Heads of State or Government of Non-Aligned Countries).

143 Rec. 1197 at ¶ 9(ii). Oddly, the recommendation is addressed to the TRNC government, rather than the occupying power. Indeed, the Cypriot delegation complained that a subsequent PACE report had "some specific references that might be perceived as acquitting the occupying power, Turkey, of its primary responsibility for . . . withdrawing its troops and settlers from Cyprus.") See PACE Information Report, The Situation in Cyprus, Doc. 13501, Annex I, 6 (22 April 2014).

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5. SYRIA/LEBANON

One of the larger mass movements of civilians into occupied territory occurred during the Syrian occupation in Lebanon. The Syrian army first entered Lebanon in 1976, intervening in the country's civil war, which erupted the year before. The Syrian military presence grew and gradually came to exert control over all aspects of politics and society in Lebanon. The Arab League gave the Syrian forces the status of "peacekeepers" in a 1976 decision, but that status expired in 1982. In 1983, the Lebanese government demanded the Syrian forces leave. The UN Security Council, in a series of resolutions, called on Syrian armed forces to withdraw from Lebanon. These demands were ignored, and the Syrians acquired a degree of control over certain regions that meets the criteria for belligerent occupation. A series of coerced treaties cemented Syrian control over much of Lebanese life, and by 1990, Syria had absolute control of a Beirut-based puppet government.

Syria maintained between 25,000 and 40,000 troops in the country during this period, as well as a broad and powerful secret police network. The Syrian domination of Lebanon certainly qualified as an occupation in an international armed conflict at some point between 1982 and 1990.[144] The Syrian presence has been labeled as such by the USA,[145] and several scholars have described the occupation, at least from 1982, as triggering Geneva Convention protections.[146] Following widespread Lebanese and international outrage at the Syrian-backed assassination of former Prime Minister Hariri in 2005,[147] Syria ultimately withdrew its armed forces and brought an end to the occupation in 2005. However, the massive movement of Syrian civilians into Lebanon, consistent with government policy but mediated by the market, has met with almost no international notice or comment. It has never been discussed in the context of Article 49(6). While the UN Security Council and

144 From 1982 to 1985, Syria was also involved in an international armed conflict in Lebanon against Israel and allied Lebanese militias.

145 Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, para 7 ("Approximately 20,000 Syrian troops and security personnel occupy much of the sovereign territory of Lebanon . . . .").

146 *See* von Glahn (1992, pp. 687–688); Slomanson (2010, p. 292); Rostow (2007, p. 205) (concluding that Fourth Geneva Convention governs Syrian military presence in Lebanon, and that it constitutes an occupation, at least of the areas under its control); The Lebanon Report, 1 Palestine Yrbk. Int'l L.216, 230 (1984) (concluding that Syria is obligated to respect Fourth Geneva Conventions provisions on occupation in Lebanon). None of these sources addresses the question of Syrian settlers.

147 U.N. S.C. Res. 1559 (2004) ("call[ing] upon all remaining foreign forces to withdraw from Lebanon").

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other actors ultimately called for the withdrawal of Syrian troops, the presence of the settlers was not condemned.[148]

Hundreds of thousands of Syrian workers followed the occupying Syrian army in the 1980s and 1990s. Lebanon had one of the most dynamic economies in the region, as well as significant demand for construction labor. Moreover, under the Syrian occupation, Syrian firms controlled key industries, and no entry or work permits were required for Syrian nationals. The scale of the migration was massive, with estimates running from half a million to over one million Syrian citizens in Lebanon by the mid-1990s (Winckle 1999, pp. 95–96). Neither country kept any records of the actual numbers.

Syria actively supported the settlers, as their incomes provided a major boost for its economy. The settlers constituted up to 30 percent of Lebanon's workforce. Syrian companies received preferential public contracts and engaged in other forms of economic domination (Nisan 2000, pp. 61–62). While many of the migrants were temporary laborers, many came for an indefinite period. The effect of the migration on Lebanon's economy was profound, leading to massive unemployment among Lebanese (Gambill 2001). As for the demographic effect:

> One Lebanese scholar has called the influx of Syrian workers into Lebanon "nothing short of a movement toward Syrian colonization of Lebanon."[5] Syrian nationals constitute at least one-third of Lebanon's resident population. Since most Syrian workers are between the ages of eighteen and fifty, there are probably more able-bodied adult Syrians in Lebanon than there are Lebanese. In 1994, under pressure from Syria, the Lebanese regime granted citizenship to over 200,000 Syrians resident in the country (*id.*).

As a result, the Syrian migrants faced hostility and often violence from the Lebanese, and depended heavily on the army and occupation regime to protect them (Pipes 2000). When Syria withdrew its forces, large numbers of the workers left with the Syrian army, fearing reprisals from resentful Lebanese (Chalcraft 2009). Yet large numbers stayed (see *id.*)—the precise numbers remain unknown. Despite the scale of the Syrian settler population and the international opposition to Syria's occupation, there was no international criticism of the former; the issue was not raised by humanitarian organizations, and almost entirely ignored by scholars. There was no international demand that Syrian nationals be removed along with the Syrian military, and indeed many remained as citizens or residents.

148 This is particularly notable because, during this period, the G.A. and S.C. repeatedly condemned as a 49(6) violation the presence in the Golan Heights—"occupied *Syrian* territory"—of ten to twenty thousand Israeli civilians.

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6. VIETNAM/CAMBODIA

Tension between the Khmer majority and the Vietnamese minority in Cambodia dates back several centuries. During the Khmer Rouge takeover and associated turmoil in Cambodia in 1970s, the Vietnamese were subject to discriminatory measures and finally pogroms and expulsions that led almost all of the population to flee (Amer 1994, pp. 216–218). In 1978, Vietnam invaded Cambodia (then styled as Kampuchea), and occupied it. In 1991, pursuant to the Paris Peace Accords signed in 1990 with various Cambodian factions, Vietnam withdrew its troops in favor of a transitional UN regime.

Several hundred thousand Vietnamese settlers came to Cambodia during the decade of occupation. Specific estimates of Vietnamese settlement vary greatly and are colored by politics, running between 300,000 and 700,000, with modal numbers in the 400–500,000 range (*id.*, pp. 219–222). The settlers fell into two groups: as many as half were returning to Cambodia after having fled violence in the previous decade, while the other half was "new migration of Vietnamese settlers who established themselves as shop owners, vendors, farmers or fishermen" (Merli 1997, pp. 6–9). Vietnamese occupation facilitated the migration principally by providing protection for the settlers. According to one scholar, "it is impossible to assess the extent to which the migration of ethnic Vietnamese . . . was encouraged by the Vietnamese authorities," but they clearly did not oppose or prevent it (Amer 1994, p. 222).

The UN Security Council failed to address the Vietnamese invasion and occupation because of a threatened Soviet veto. However, in a series of annual resolutions, the General Assembly described the situation as one of "foreign occupation." From 1983 to 1989, these resolutions expressed "serious[] concern about reported demographic changes imposed in Kampuchea."[149] However, the resolutions did not call for any action regarding these changes. While the resolutions repeatedly called for the withdrawal of foreign forces, they did not concomitantly urge the withdrawal of the agents of demographic change. Moreover, none of the resolutions mentioned Article 49(6) or suggested any violation of international law resulting from these changes.

The fate of the Vietnamese settlers was raised by Cambodian representatives in the multilateral Paris peace negotiations that were held between 1989 and 1991. The Kampuchean representatives were extremely hostile to the Vietnamese settlers, arguing that their continued presence would *de facto*

149 Res. 38/3 (27 October 1983); 40/7 (November 5, 1985); 44/22 (November 17, 1989).

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perpetuate the Vietnamese occupation, and that they would serve as puppets of Vietnam.[150] These arguments were rejected by the peace brokers, and were not reflected in the final instruments.

Indeed, the internationally sponsored and endorsed peace agreement did not call for the removal of any civilian settlers. Instead, following an Australian suggestion, it transformed the settler question into one of voter registration, to be decided by the new government under the supervision of a UN authority.[151] However, many settlers were allowed to participate in the special election for a new government. Voting would be open to those born in Cambodia, or with at least one parent born there,[152] a concession to the large numbers of settlers whose families originated in northern Cambodia and had fled in prior decades. This ultimately allowed many Vietnamese to participate in the elections. Notably, the Peace Agreement and its associated documents only required the withdrawal of Vietnamese military forces;[153] the civilians were allowed to stay, under the protection of the UN transitional regime and its peacekeepers.

However, many Vietnamese fled in anticipation of mistreatment by the new Cambodian government, and many more fled when those fears were realized, and the Khmer Rouge massacred thousands. The years following the Vietnamese withdrawal saw widespread attacks on the Vietnamese population, which the UN condemned, but failed to stop (Hughes 1996, pp. 65–70). After a new Cambodian government was elected, the situation has stabilized significantly. Nonetheless, it seems the majority of the settlers—some 700,000 people, or 5 percent of Cambodia's population—have remained to this day,[154] despite significant hostility from the government and Khmer population.[155]

150 Erlanger (1989); Haas (1991, p. 222) (noting that other countries involved in peace process rejected Cambodian demands that it include "just solution" to the issue of "foreign settlers").

151 The UNTAC rejected a Cambodian proposal that registration of Vietnamese-born voters incorporate ethnic criteria. See Third Progress Report of the Secretary-General of the UNTAC, UN Doc S/25124 (1993), at para 33–34; see also para 30 (noting sensitivity of Cambodians to voting by Vietnamese).

152 Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Annex III, Art. 4.

153 *1*, Annex II, Art. VI.

154 CIA World Factbook: Cambodia, available at https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html.

155 *See* Berman (1996, p. 817) (arguing Cambodian treatment of Vietnamese settlers violates international law); see also Villadiego (2014).

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7. ARMENIA/AZERBAIJAN (NAGORNO-KARABAKH)

7.1 History of the Conflict

Nagorno-Karabakh is a region in Azerbijan that has historically had a substantial Aremnian majority. Under the Soviet Union, the mountainous region had the status of an "autonomous province" or *oblast* within the borders and formally part of Azerbaijan Soviet Socialist Republic. Upon the collapse of the Soviet Union, the oblast declared its intent to secede from Azerbaijan, with Armenia's military asistance. This led to a protracted war between Armenia and Azerbaijan that left 30,000 dead. A cease-fire was announced in 1994, leaving Armenia the clear victor in the field. Its armies secured Nagorno-Karabakh, its principal war goal. Armenia also seized control of the "Lachin Corridor," a mountainous region that serves as a corridor to the discontigous Karabakh enclave, as well as a ring of territory around the erstwhile *oblast*. Azerbaijan's claim to Karabakh is based on the *uti possidetis* principle, whereas Armenia's (weaker) claim depends on self-determination and historical ties. However, the Lachin corridor and collar areas were undoubtedly *de jure* Azeri sovereign territory, and their return remains one of the central sticking points of the conflict. Subseqent OSCE (Organization for Security and Cooperation in Europe)-sponsored peace negotiations have failed to make any progress (Garibov 2016).

While the Armenian army remains in control of the territory, it is notionally under the authority of the Nagorno-Karabakh Republic, an entity not recognized by any UN Member States except Armenia. The United Nations regards NK and the surrounding region (amounting to approximately 16 percent of Azerbaijan) as Armenian-occupied territory,[156] a view shared by the USA[157] and the ECHR.[158] Like Abkhazia and the TRNC, Nagorno-Karabakh styles itself an independent republic, but lacks international recognition and is entirely dependent on Armenian military and financial support.

7.2 Armenia's Settlement Policy and Article 49(6) Violations

Demographics have always been a central aspect of the Karabakh conflict. The core of the Armenian claim to the area lies in the Armenian population in the area. During the war, a million Azeris fled Armenian-controlled territory, and

156 *See* U.N. G.A. Res. 62/243, para 5 (March 14, 2008) ("Reaffirms that no State shall recognize as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation.")

157 *See* CIA World Fact Book: Azerbaijan. https://www.cia.gov/library/publications/the-world-factbook/geos/print_aj.html

158 *Sargsyan v. Azerbaijan*, E.C.J. (Grand Chamber), Judgment (Merits), paras 23–25 (1995).

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large numbers of Armenians fled Azerbaijan. As a result, Karabakh now has an almost entirely ethnic Armenian population, but the fate of Azeri refugees remains a major issue for Azerbaijan.

Against this background, Armenia has encouraged migration to the occupied territories, particularly those under clearly *de jure* Azeri sovereignty, such as the remote Lachin corridor. Azerbaijan has strongly and repeatedly protested these moves and denounced them as a violation of international law, and Article 49(6) in particular.[159]

An OSCE fact-finding mission conducted numerous interviews over the entire Lachin District and revealed that private initiative and not government action was the driving force prompting a move to Lachin. The mission found no evidence that the authorities, in a planned or organized manner, actually asked or selected people to settle in Lachin corridor. The authorities have tried, however, to create basic conditions for normal life and are, in this way, actively encouraging settlements (OSCE Minsk Group 2010).

Moreover, various political parties and public associations helped recruit settlers. While many of the settlers had fled from other areas of Azerbaijan, they were issued Armenian passports when they settled in Armenia-occupied territory. In some places, settlers apparently received financial support from the government, such as grants, tax benefits, free utilities, and so forth (*id.*, pp. 22, 25, 27).

7.3 (Proposed) Transitional and Post-Conflict Treatment of Settlers

International discussions of the Karabakh conflict recognize it as an occupation, but have not declared this to be an Article 49(6) violation or called for settler removal. The UN General Assembly has condemned Armenia's occupation and called for a withdrawal of its forces.[160] Nonetheless, the resolutions omit any reference to settlers, despite the issue being forcefully raised by Azerbaijan in the plenary discussions.[161] Indeed, draft language condemning settlers has been stripped from GA resolutions.[162] The OSCE's "Minsk Group," co-chaired by the USA, France, and Russia, has been stewarding attempts to end the conflict.

159 U.S. Azeris Network Testimony, 113 Cong. (2013) (Statement of Adil Baguirov) http://docs.house.gov/meetings/AP/AP04/20130314/100434/HMTG-113-AP04-Wstate-BaguirovA-20130314.pdf.

160 *See supra* note 157.

161 *See* GA 62nd Session, 86th Plenary, A/62/PV.86, 2 (March 14, 2008) Statement by Azerbaijan ("Armenia has launched an outrageous policy of massive illegal settlement of Armenian populations in the occupied territories, which is another blatant violation of international law."). Notably, none of the Western countries mentioned Armenia's settlement activity.

162 *See* A/60/L60* (Aug. 4, 2006) http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N06/453/93/PDF/N0645393.pdf?OpenElement.

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While the OSCE has documented Armenian settlement efforts, neither its proposed roadmap of principles for resolving the conflict, nor any of its statements, mention either a halt to settlement activity or a removal of settlers.

The European Parliament has criticized Armenian actions in great detail, but has not mentioned settlements or Article 49(6). Similarly, there have been several motions in PACE to condem Armenian settlement as a violation of international law and Article 49(6) in particular, but these never reached the floor.[163] The USA has shown no interest in the settlement policy, and refused to condemn it (News.az 2013). Perhaps the most direct international condemnation can be found in resolutions of the Organization of Islamic States and its Council of Foreign Ministers, such as the one adopted in Tashkent in 2010.[164]

8. RUSSIA—GEORGIA (ABKHAZIA) AND UKRAINE (CRIMEA)

Russia has in recent years occupied and annexed—*de jure* or *de facto*—parts of both Georgia and Ukraine. These conquests, and particularly the seizure of Crimea from Ukraine, have resulted in widespread condemnation. However, Russia's occupation policies, and in particular issues involving Article 49(6), have received almost no international attention. Moreover, there is very little public information on possible settlement activities, as a result of, among other things, the relative inaccessibility of Abkhazia, Russian restrictions on NGO activity and monitoring, and most importantly, an apparent disinterest in the issue by most international human rights groups. The analysis presented here is the first comprehensive examination of Russian settlement activities in its occupied territories.

A very significant number of settlers have been moving to Crimea, attracted in part by Russian economic incentives. There is also a not particularly successful, but highly deliberate, settlement enterprise in occupied Georgia. Both of these enterprises appear to involve purposeful efforts to change the demographic composition of the territory. Neither of these efforts has attracted any international interest or scrutiny, despite the high profile of the occupations within which they take place. None of these efforts have been described as an Article 49(6) violation by an actor outside the occupied states.

163 Doc. 10991, 28 June 2006, Illegal settlement of Armenians in the occupied territories of Azerbaijan by Armenia as a gross violation of the principles of international law, available at http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11341&lang=EN.

164 *See* Resolution No. 10/37-POL, para 16 ("the transfer of settlers of the Armenian nationality ... constitutes a blatant violation of international humanitarian law and has a detrimental impact on the process of peaceful settlement of the conflict."); Res. 9/33-P, para 14 (June 2006) ("demands to cease and reverse immediately the transfer of settlers of the Armenian nationality to the occupied territories of Azerbaijan").

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8.1 Russia's Occupation of Georgian Territory—Abkhazia

Perhaps the most obscure settler situation examined in this article is an ongoing one. As a result of the Russo-Georgian war of 2008, Russia took complete control of Abkhazia and South Ossetia, two ethnic separatist areas that had been seeking to break away from Georgia since its independence in 1991 (Russia in effect sided with the separatists in their conflict with Georgia). While Russia remained in control of these areas, it purported to recognize both of them as independent states. The "Republics" of Abkhazia and South Ossetia maintain the styles and external trappings of states, but are in effect somewhat autonomous local administrations of Russia. Only three other states (Nicaragua, Venezuela, and Nauru) have recognized the independence of these entities, while the overwhelming reaction of the international community has been to reject and condemn Russia's recognition of these entities and treat them as part of sovereign Georgian territory.

Since the war, the nominal Abkhaz authorities have engaged in a centralized, state-sponsored program to settle people in the territory. The explicit purpose of the program is to change the demographics. Abkhazia has traditionally had a large ethnic Georgian population, which at the time of Georgian independence constituted a substantial plurality of the population. Most of these ethnic Georgians were forced out by separatist rebels in a 1992–1993 conflict (Human Rights Watch 1995). In the aftermath of the 2008 war, Georgia claims that Russia has taken steps to expel or pressure out the remaining Georgian population.[165]

While the settlement policy described below is nominally undertaken by the Abkhaz government, it is directly attributable to Russia. That is because the territory is in fact occupied by Russia. To be sure, the Abkhaz local authorities have some degree of autonomy in their policy judgments, and occasionally even have disagreements with Moscow. Nonetheless, Russia has effective control over the area, and thus bears the responsibilities of an occupying power. As the ECtHr ruled in a similar situation—the TRNC in Northern Cyprus—the existence of a "subordinate local administration" in an occupied territory does not change the responsibility of the occupying power (see Loizidou v. Turkey). Similarly, ECtHr ruled in a case about another post-Soviet "frozen conflict" that Russia's extensive "military, political and economic support to the [Transdniester] separatist regime" made the acts of the purported "Transdniesteria Republic" legally imputable to Russia itself.[166] As will be seen, Russia's control of Abkhazia is, if anything, even greater.

165 Georgia Ministry of Justice (2008).

166 *Ilascu v Moldova & Russia*, App. 48787/99, Grand Chamber Judgment, paras 382–385 (2004), available at http://hudoc.echr.coe.int/eng?i=001-61886. The Court did not specifically discuss the law of occupation,

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8.2 Existence of an Occupation and Russia's Responsibility

The Russo-Georgian war of 2008 qualified as an international armed conflict, which triggers the application of the Geneva Conventions.[167] The international community has largely avoided characterizing the territorial situation in any legal way,[168] but there is ample consensus that the territories remain under Russian belligerent occupation.[169] The view that they are not occupied appears to be held primarily by Russia itself, which claims it is merely providing support to the unrecognized Abkhaz Republic.

Shortly after the war, Georgia passed the "Law on the Occupied Territories," declaring Abkhazia and S. Ossetia to be under Russian belligerent occupation, and purporting to forbid many kinds of interactions (including physical entry) by third countries and their nationals with the occupation regime.[170] The existence of a belligerent occupation has been recognized by the European Parliament, the Parliamentary Assemblies of the COE, OSCE, and NATO.[171]

167 Situation in Georgia, ICC Pre-Trial Chamber I, Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15, para 23 (January 27, 201).

168 *See, e.g.*, http://eeas.europa.eu/delegations/vienna/documents/press_corner/20160304-eu-statement-on-the-human-rights-situation-in-the-georgian-breakaway-regions-of-abkhazia-and-south-ossetia_en.pdf.

169 Parliamentary Assembly, Council of Europe, Res. 1916 Art. 5 (2013) ("I]t is seen by Georgia and most of the international community as an occupation of part of the country by the troops of a neighbouring country.").

170 For example, the UNHRC's Universal Period Review does not characterize the status of the territories at all, despite numerous states arguing that they are occupied. See Report of the Working Group on the Universal Periodic Review: Georgia (January 13, 2015), A/HRC/31/15.

171 *See* European Parliament Resolution of 6 February 2014 on the EU-Russia summit (2014/2533(RSP), P7_TA-PROV(2014)0101, Art. 22 (referring to "occupied territories" in Georgia); EU Parliament Resolution of 17 April 2014 on Russian pressure on Eastern Partnership countries and in particular destabilisation of eastern Ukraine, 2014/2699(RSP) ("whereas Russia is still occupying the Georgian regions of Abkhazia . . . in violation of the fundamental norms and principles of international law; whereas ethnic cleansing and *forcible demographic changes have taken place in the areas under the effective control of the occupying force, which bears the responsibility for human rights violations in these area*") (emphasis added); OSCE Parliamentary Assembly, Tbilisi Declaration (July 2016), Resolution on the Conflict in Georgia, paras 6–7, 12 (recognizing existence of occupation and "urg[ing] the Russian federation to . . . stop occupation of territories in Georgia."), available at https://www.oscepa.org/documents/all-documents/annual-sessions/2016-tbilisi/declaration-24/3371-tbilisi-declaration-eng/file; PA COE, Res. 1916, supra, Art. 8.2; NATO Parliamentary Assembly, Res. 382, Art. 5, On the Situation in Georgia (November 2010) ("Deeply concerned by the humanitarian situation in Georgia's occupied territories of Abkhazia and South Ossetia, as well as the ongoing denial of the right of return to Georgian populations displaced from the two regions."). Cf. NATO Warsaw Summit Communiqué, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8–9 July 2016, Art. 113 (calling on Russia to respect Georgia's territorial integrity, withdraw its troops from Abkhazia, and stop other actions, but avoiding term "occupation").

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The USA has repeatedly characterized the situation as one of occupation,[172] as has President Francois Hollande of France,[173] and numerous former Soviet republics. Russia maintains full military and civil control of the territory, though it chooses to allow it to be administered through a local authority with some degree of discretion. Thousands of Russian troops have remained in the territories since the 2008 war (Kucera 2011). Russia exercises complete military control over the area. Russian troops control the border crossings within the territory (Coffey 2015). The unrecognized Abkhazian authorities purport to maintain a separate military, though it is headed by a Russian general,[174] acts under Russian control,[175] and is itself smaller in size than the Russian occupation forces. In any case, the Abkhaz local militia has been integrated formally into the Russian forces through a series of agreements that observers have described as "*de facto* annexation." (These agreements also formally integrate the Abkhaz civil authority with Russia.) These treaties have been roundly denounced by the USA, the EU, and others.[176] Some commentators have suggested the true question is not whether Abkhazia is occupied, but whether it has also been annexed (Kalandarishvili-Mueller 2015).

Aside from its troops in the territory, Russia controls the economy, which is heavily integrated with Russia's.[177] The ruble is the official currency. Moscow's direct budgetary support amounts to most of the Abkhaz entity's state budget (see International Crisis Group 2013), and additional grants and spending constitute up to 20 percent of the territory's GDP.[178] That is just direct government support from Moscow; the territory's trade is entirely dependent on Russia, and in particular the 1.5 million Russian tourists who come annually (Balmforth 2016). Russia has "passportized" the territory, giving 80 percent of the population Russian citizenship.

The Abkhaz government is unrecognized, and is itself an instrumentality of Russia. Thus, the acts of the purported Abkhaz officials are attributable to

172 Baer (2016) ("Russia's ongoing occupation of Abkhazia and South Ossetia, which together constitute 20 percent of Georgia's territory, remains unacceptable."); statement by Sec. Kerry: On the Occasion of the Independence Day of Georgia (May 24, 2016), http://georgia.usembassy.gov/news-events/dc2016t/24052016statement.html.

173 Agenda.ge (2014).

174 RadioFreeEurope/ RadioLiberty (2015).

175 Georgia Journal (2010).

176 RadioFreeEurope/RadioLiberty (2014).

177 Freedom House (2015a): "The ability of elected authorities to set and implement policies is limited by the influence of Moscow."

178 *See* Karlidag (2014); Weir (2016) (estimating Russian subsidies at $100 million a year); Georgia Times (2010) (estimating GDP at $500 million).

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Russia. To put it differently, as the occupying power, Russia directly participates in the movement of new settlers into the territory by (i) allowing them entrance into the territory, accessible only through Russia—and such entry is illegal under Georgian law;[179] (ii) providing the bulk of the Abkhaz entity's budget.

8.3 Russia's Settlement Policy and Article 49(6) Violations

Under Russian occupation, Abkhaz authorities have embarked on an explicit settlement enterprise, designed specifically to bolster the proportion of ethnic Abkhazians in territory, at the expense of Georgians, and thus cement the split from Georgia.[180] Such an enterprise faces inherent challenges, as the entire Caucuses region experiences net population outflow due to economic conditions. Georgia itself has perhaps the largest emigration rate in the world, having lost 20 percent of its population since independence.[181] Thus bringing in any number of people requires focused governmental policy.

The occupation authorities have established an official government entity, the State Committee on Repatriation, which encourages ethnic Abkhaz from the diaspora to move to the occupied territory. It actively recruits such individuals, and organizes their flights and transportation.[182] The authorities also provide them with free housing, subsidies, and other assistance (Institute for War and Peace Reporting 2010). Significant sums are invested in construction for the settlers. In 2013, Abkhaz State Committee for Repatriation authorities reported that over 7,300 ethnic Abkhaz settlers had come to the occupied territory in the past two decades.[183] The number seems small until considered against the backdrop of local demographics. While precise numbers are disputed, there are roughly 180,000 inhabitants of the territory, a slight majority of them Abkhazi. Thus the settlers represent over 4 percent of the population, and an even greater share of the non-Georgian people.

179 The settlers first fly into the Russian airport in Sochi, and then travel overland to occupied Sukhumi, with "all necessary assistance . . . on the part of the Russian" government, according to local Abkhaz officials (Abkhaz World 2013).

180 Barry (2009, p. A6); Gorogyan (2014) (describing purpose of settlement program as "chang[ing] the demographic balance" of the territory).

181 WB Report: Georgia Among Largest Emigration Countries. Civil Georgia. January 16, 2007

182 As part of the government budget, the settlement program is primarily financed by Russia. See Abkhaz Foreign Ministry (2013).

183 С 1993 года по 2013 год госкомитетом РА по репатриации зарегистрировано 7 365 человек". Apsnypress. 6 August 2013. Retrieved 9 August 2013. The Abkhaz settlement scheme gained new momentum in recent years as a result of the Syrian civil war, when Sukhumi brought in 500 people from there. Kuprashvili & Arshba (2013).

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The remoteness of the region has obviously limited the potential for settlement from Russia, but there has been some such movement. Still, it is poorly documented, as U.S. State Department cables reveal. In particular, there have been many reports of Russians buying second homes and vacation properties in the region—some of which appear to be the abandoned houses of ethnic Georgians. The Russian tourism industry is investing heavily in the territory, resulting in a major boom in visitors from Russia. Finally, Russia is engaging in significant infrastructure development, including the rail link from nearby Sochi, the site of the 2014 Olympics, to Sukhumi, the administrative capital of Abkhazia. These projects will further integrate Abkhazia and promote Russian migration, and real estate prices have already risen in anticipation of the Russian influx.

Russia has taken no measures to stop Russian nationals from moving into the territory, and certainly promotes infrastructure upgrades and construction that helps the settlers. While perhaps a third of the ethnic Abkhaz settlers come from Russia, the majority come from third countries with an Abkhazi diaspora, raising interesting questions about the meaning of "transfer." In the context of the Convention's text, the prohibition would seem to be limited to prior residents of the territory of the occupying power. It would seem to not include immigrants from third countries, regardless of their ethnicity.[184] On the other hand, in at least one context the UN Security Council has declared that allowing "new immigrants" to settle in occupied territory constitutes a 49(6) violation,[185] and third country Jews who move to the West Bank are typically treated as "settlers" in state practice.[186]

Finally, it is important to note that the settlement policy is accompanied by what appear to be efforts to force out ethnic Georgians from the territory. While most Georgians fled Abkhazia during the civil unrest of the early 1990s, roughly 40,000 remain in one major enclave in the territory. Under the Russian occupation, various restrictive policies have been adopted to limit their freedom of movement, economic viability, and education choices. According to Georgia

184 *See* Arai (2009, pp. 349–350) (arguing that text of the provision would not apply to such circumstances, but speculating that an interpretation in light of custom might). One should note that settlement of third country nationals in Northern Cyprus has not encountered any international condemnation.

185 U.N. S.C. Res. 465 Art. 5 (1980). Interestingly, Abkhazian President Sergei Bagapsh explicitly compared the settlement program to Israel's Law of Return, which is not aimed at settling diaspora immigrants in occupied territories: "Can anyone condemn Jews for calling on all the Jews of the world and inviting them to Israel?" *See* Barry (2009).

186 The U.S. Consulate estimates 45,000 Americans live in the West Bank, though not all moved there (Ahren 2011).

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and human rights groups, these policies pressure them to leave the occupied territory.[187]

8.4 Crimea

Russia's occupation and annexation of the Crimean peninsula, legally part of Ukraine, in the spring of 2014, as well as its subsequent invasion of other parts of Ukraine, have provoked widespread international outrage and condemnation. The annexation has been overwhelmingly denounced as illegal.[188] The existence of a belligerent occupation does not seem to be in doubt. Ukraine passed a law that declared the territory under Russian occupation, and restricted business and movement into the area.[189] In November 2016, Ukraine's chief prosecutor announced that his government has documented transfer by Russia of 72,766 settlers into territory, which he claimed violated international law.[190] However, the settlement enterprise in Crimea has not been discussed or reported by international human rights groups.

In many ways, the international response was unusually robust. In particular, the USA and EU responded to Russia's annexation and ongoing aggression with a series of sanctions, implemented in several stages.[191] These included asset freezes on key allies of President Putin, an arms embargo, restrictions on access to capital markets, and several other measures targeted at certain Russian individuals and industries.[192] The illegality of Russia's annexation continues to be proclaimed repeatedly by states and international organizations.

Russia's occupation has been accompanied by large-scale rights abuses, including the expulsion of protected persons from the territory (Freedom House 2015a). While these abuses have received international attention, there

187 Human Rights Watch (2011) (noting the occupation policies "could force large numbers of Abkhazia's ethnic Georgians to leave their homes forever"). The extent to which such policies have succeeded is unclear due to the lack of reliable population figures for Abkhazia as a whole, and the Georgian minority in particular (*id.*, p. 22). See also, Human Rights in the Occupied Territories of Georgia, Information Note Distributed by the Delegation of Georgia to the OSCE, RC.DEL/186/10 pg. 3–4 (18 October 2010), http://www.osce.org/home/73289?download=true.

188 *See, e.g.*, U.N. G.A. Res. 68/262 (2104).

189 On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine, http://usa.mfa.gov.ua/mediafiles/sites/usa/files/2014.05.26_Law_on_occupied_Crimea.pdf.

190 Ukranian Prosecutor Called Exact Number of Occupants in Crimea, QHA Ukranian News Agency (Nov. 23, 2016), http://qha.com.ua/en/politics/ukrainian-prosecutor-called-exact-number-of-occupants-in-crimea/ukrainian-prosecutor-called-exact-number-of-occupants-in-crimea/139491/.

191 EU Sanctions against Russia over Ukraine Crisis, European Union Newsroom, https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis_en.

192 *Id.*

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has been no discussion by states, international organizations, or international human rights groups of Russia's settlement policy in Crimea.

Russia has an explicit policy of attracting Russians to the occupied territory. There is very little publicly available information on the success of these efforts. The issue of settlers and Article 49(6) violations in Crimea is not monitored or tracked by international human rights groups. Thus, the discussion here will necessarily be cursory. In March 2015, Russia provided for the allotment of free agricultural land to Russian citizens, based on their professional occupation, with the stated aim of drawing in-demand professions to Crimea.[193] Russia also actively subsidizes Crimea tourism to attract Russians to the territory in large numbers (Associated Press 2014; Leveille 2014), and is developing a massive infrastructure project to allow easier movement from Russia into the territory.[194]

The only study of Russian settlement activity in the territory is a report by a coalition of Ukrainian human rights groups, supported by the Kiev government (Regional Center for Human Rights 2015). The report measures the movement of Russians into Crimea by using Russian residence registrations—Russians are required to register their address with the government, and also officially change their recorded residence when moving to a new town. Based on these registries, the study concludes that Russian "population transfer" has been quite rapid:

> [The number of settlers moving to Crimea] from June 2014 to September 2015 totaled 20,163 people, which is about 1% of the territory's official population. Taking into account other migration data, it can be claimed that this figure shows a percentage of substitution of the inhabitants of Crimea by citizens from the territory of the RF (*id.*, pp. 12–13).

These possible Article 49(6) violations are allegedly accompanied by efforts to force non-Russian minorities out of the territory. There have been numerous reports of widespread human rights violations against Ukrainians and Tartars in particular (EU Parliament 2016). At the same time, up to 100,000 people—overwhelmingly non-Russians—have fled the territory since the annexation (see Blair 2016). It is impossible to determine at this point if this is a result of a purposeful policy of forcible expulsion, but it does significantly increase the demographic effect of Russian settlers.

193 Announcement on the official webpage of the Ministry for Property and Land of Crimea, http://mzem.rk.gov.ru/rus/index.htm/news/297007.htm. The list of professions is rather generous and includes 45 categories.

194 Reuters (2016).

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Despite the intense international attention on the Crimea situation, and the imposition of sanctions on Russia for many other violations of international law related to Crimea, no country, international organization, or international human rights group has said anything about the Crimea settlers, or even attempted to monitor whether there was settlement activity.[195] To be sure, some Ukrainian officials have called for an international criminal inquiry of the settlement policy (Ministry of Information Policy of Ukraine 2015). Ukraine has, by an Article 12(3) declaration, accepted the jurisdiction of the ICC, and a preliminary examination extending to Crimea has recently begun. However, in its 2016 Report on Preliminary Examinations, the ICC Prosecutor makes no mention of Russian settlement activity whatsoever.[196]

9. CONCLUSION

This article has shown that, outside the context of Israel, Article 49(6) is not invoked by the international community in reaction to settlement enterprises in occupied territories. The most striking thing about the state practice is the ubiquity of settlement activity and the accompanying international acquiesce. Large-scale settlement activity appears to be an almost inevitable accompaniment of all but the briefest occupations of contiguous territory. Most of the examined settlement movements into occupied territory have proved demographically significant. The arrival of settlers has in the case studies here typically been accompanied by a similarly large-scale expulsion or departure of the prior population.[197] Vietnam and Israel appear to be among the unusual exceptions in which prior populations remained intact.

While state practice cannot define precisely what constitutes a transfer within the meaning of Article 49(6), it does clearly show that a variety of broad and aggressive definitions of the term are plainly inconsistent with state practice under the Geneva Conventions, and incompatible with any positivist view of international custom. In particular, suggestions that Article 49(6) prohibits mere facilitation by states, or even more broadly, requires them to take measures to prevent migration, have no support in state practice, and international reaction to it. To the extent these interpretations are not mandated by the text

195 For example, Human Rights Watch said in the wake of Russia's annexation that it was bound by Art. 49(6)'s prohibition on "transfer." *See* HRW (2014). However, subsequent reports on Crimea have not touched on the issue at all. See, e.g., HRW (2016).

196 *See* ICC OTP, Report on Preliminary Examinations (2016).

197 Depending on the circumstances of the flight of the prior population, this could itself be a violation of Article 49.

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of the provision, the state practice gives strong grounds for rejecting them. Moreover, state practice directly contradicts broad definitions of transfer as including births to transferees subsequent to transfer ("natural growth" in the argot of the Middle East Peace Process) or migrants from third countries. In short, the more broadly one wishes to define the anti-settlement norm, the greater the tension with state practice.

Another major conclusion from the state practice is that the removal of Article 49(6) settlers is not the required remedy for the relevant war crime. Indeed, significant state practice suggests that at least some of the settler population must not only be allowed to stay past the occupation, but also to participate in subsequent self-determination processes in the territory. In particular, those settlers born in the occupied territory have, in a wide variety of post-conflict situations, been treated as having a presumptive right to citizenship in any new post-conflict state.

One might suggest that the absolute absence of removal as a remedy for settlers is simply a result of the voluntary waiver or consent to their presence by the occupied peoples or countries, and thus does not establish the baseline rule. This possibility is heavily discounted by the fact that the notion of removal as a default remedy is simply not part of the negotiations or discussion surrounding these situations. Indeed, it is clear that in many cases the affected population would prefer removal, but it is simply not in the legal option set as framed by the international community.

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Before further elaborating on these conclusions, a methodological note is in order concerning what can and cannot be learned from such a study of state practice. One may wonder how much one can conclude from the state practice, given that it consists of affirmative acts by a few occupying powers, combined with a complete absence of legal condemnation or censure by others. This may raise questions about whether the vast state practice surveyed here is accompanied by an *opinio juris* sufficient to make it legally significant.[198] On the part of the acting (settling) states, *opinio juris* is strongly indicated by the lack of any abstention by states from acts that could violate Article 49(6).[199] Simply put, no occupying power has ever taken any steps to discourage or obstruct migration into occupied territory. In no occupation has any occupying power—even

198 In international law, objective state practice must combine with *opinion juris*, a judgment by the relevant states that the action or inaction is legal or illegal.

199 ICRC, Customary International Humanitarian Law (explaining that existence of a prohibition can be illustrated in state practice by "physical practice abstaining from the prohibited behaviour").

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those generally concerned with adherence to international humanitarian law—taken any action that would suggest it understands the Geneva Convention as creating any obligation to obstruct, discourage, or deny facilities to settlement efforts. The occupying powers' evident judgment that they are not obligated to prevent or obstruct such activities has in no case been challenged by the international community, giving it presumptive validity.

And indeed, the migration of people into occupied territories is overwhelmingly the rule rather than the exception where such territories are geographically adjacent. If all this constitutes a violation of Article 49(6), then it would easily be the most universally and ubiquitously violated prohibition in the Geneva Conventions. However, the ICRC, the Conventions' watchdog, has never identified any problem with systematic worldwide disrespect for Article 49(6).

Another notable and extremely consistent pattern discovered in this study is the failure of third countries or international organizations to describe the settlement activity as violations of Article 49(6). To be sure, silence does not have the same weight as affirmative approval in establishing *opinio juris*, but the latter is always rare (see, e.g., Osiel 2009, p. 55). Silence counts. As Prof. Shaw explains:

> Generally, where states are seen to acquiesce in the behavior of other states without protesting against them, the assumption must be made that such behavior is accepted as legitimate ... This means actual protests are called for to the break the legitimizing process [when a new rule is being established by affirmative conduct] (Shaw 2014, p. 55).

In the situations studied in this article, the failure to raise legal objections is consistent and general, and extends to international organizations and groups (the UN Human Rights Commission, the ICRC, and humanitarian NGOs like HRW), whose work is to systematically point out violations of these norms.

Numerous other circumstances give added weigh to this silence.[200] For one, the situations here are not ones that escaped international political condemnation and legal scrutiny. In most of these contexts, the international community has condemned the underlying occupation or aggression, and in most if not all cases, it has criticized the occupying power for violations of IHL and human rights norms. Thus the UN, the EU Parliament, PACE, and other bodies have been asked to denounce these activities as illegal, and have refused.

Such omission speaks loudly. Indeed, in various contexts (e.g. Cyprus, Georgia) the occupying power has been criticized by the international

200 *See* Koskenniemi (2006, p. 437) (noting that silence can under some circumstances be evidence of *opinio juris*).

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community for the transfer out of protected people (Article 49(1)), but nothing was said about Article 49(6). Finally, when some of the settlement activities were criticized by the international community (Vietnam, Armenia), they were not branded illegal. In these cases, we are not dealing with pure silence, but rather with the kind of silence that suggests the underlying conduct is either legal or not clearly illegal.

Moreover, some of these settlement situations fall within the jurisdiction of the International Criminal Court (Cyprus, Ukraine, and Georgia). Yet the Prosecutor has not taken any steps to investigate the settlement activities in those contexts, even as part of broader examinations or investigations of those situations. Given that the Prosecutor's job in a preliminary investigation is at least to note relevant crimes, its failure to do so is legally significant.[201]

Finally, this study has also shown affirmative practice and *opinio juris* by observer states, in the form of the numerous peace plans that deal with settler situations. These plans, approved by the UN or other international organizations, provide strong evidence that there is no legal obligation for a removal of settlers. It bears noting that in many situations, the presence of a large number of settlers has not been an obstacle to conflict resolution, or undermined self-determination.

Nor can the general acquiescence be explained in part by suggesting that some settlement enterprises (like Russia's in Georgia and Ukraine) may be too small or short lived to reasonably warrant international notice. For example, the UN General Assembly first condemned Israeli settlements in 1975[202] and the UN Security Council in 1976, when the settler population numbered approximately 20,000, or roughly 1.6 percent of the population of the territories, a smaller proportion than in any of the situations discussed here, and smaller in absolute numbers than all but one (Nagorno-Karabakh).

Doubtless some will attempt to dismiss the findings of this article by saying the treatment of settlers in these other contexts was merely politics, rather than law. To be sure, geopolitics is always a presence in international law. That is why scholars must study an issue across all possible geopolitical contexts. Consistency of treatment across different geopolitical contexts suggests a legal rather than a political explanation. Moreover, the situations discussed here are not marked by an international fear of condemning the occupying power—they often are condemned, just not for illegal settlement activity.

201 *Compare*, ICC Rep. Prelim. Exam, supra note 200, para 68–70 (discussing Israeli settlement activities in context of examination of situation in Palestine), *with* paras 235–255 and 110 (making no mention of settlement activities in context of Georgia and Russia preliminary examinations).

202 *See* G.A. Res. 3225 Art. 5(a) (1975).

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Once one admits possible political explanations for how Article 49(6) is applied, one would have to consider the possibility that maybe it is the exceptional treatment afforded to the Israeli case that is the political one. To put it differently, the point of looking at the broadest set of data is to help exclude alternative hypotheses like "politics." With a data set of one, one cannot determine whether observed reactions are political or not. When one compares the international community's consistent treatment of settlements across several vastly different geopolitical situations, with its differential treatment of the Israeli case, it becomes difficult to presume that the reaction to the latter is "law" and the former "politics."

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This article's comprehensive survey of settlement activity in occupied territories around the world reveals some common elements. First, the significant migration of settlers into an occupied territory under the auspices of the occupying power is a ubiquitous feature of prolonged territorial control. Article 49(6) notwithstanding, there is no instance of prolonged occupation of adjacent territory that has not seen large-scale settlement. Such migration occurs with varying degrees of governmental encouragement—from complete top-down organization in some cases, to mere facilitation in others. Second, there is no instance of an occupying power taking concerted measures to discourage, prevent, or obstruct such migration. Nor in any of these cases has there been any effort by the occupying power to repatriate settlers or dismantle settlements.[203] Third, no international actor or body has described any of this activity—which has occurred in a wide variety of places, geopolitical contexts, and times—as a violation of Article 49(6). Finally, there has been no suggestion that the occupying power is obligated to remove such settlers. In the numerous cases where the international community has been involved in establishing the parameters of an end to the occupation, the removal of settlers has not been required, with the partial exception of Northern Cyprus. In several other contexts, however, international parameters explicitly envision all settlers who wish so to remain, and calls by the occupied people for their removal have been rejected.

All of this is in complete contrast to how the settlement issue has been applied in relation to Israel (in both the West Bank and Golan Heights situations). At the very least, this suggests than any international legal discussion or

203 In this context, Israel's removal of all Israeli civilians from the Sinai Peninsula, Gaza Strip, and northern Samaria has no parallel elsewhere in the world.

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understanding of the meaning and application of Article 49(6) cannot proceed, as a scientific matter, solely via one anomalous case.

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